LIST OF CONTENTS

	Page
Docket Entries	1
Stipulation of the Parties	8
Exhibit 10 to the Stipulation	21
Exhibit 11 to the Stipulation	32
Deposition Testimony:	
County Commissioner Robert Y. Eckels	40
County Commissioner Tom Bass	53
County Judge Bill Elliott	84
County Commissioner Jamie H. Bray	96
Judgment Order of the District Court	104
Opinion of the District Court	106

CLERK'S DOCKET ENTRIES

THREE JUDGE COURT REQUESTED

CONSOLIDATED WITH C.A. 73-H-1033
TO BE CARRIED UNDER C.A. 73-H-993

73 - H - 9

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

Three Judge Court
John T. [illegible]
Carl O. Bue
Thomas Gee

D. C. Form No. 106A Rev.

TITLE OF CASE	ATTORNEYS
RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J.W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, On His Own Behalf and On Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct NOS. 5, 6 & 7 of Harris County, Texas VS HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individ. and as County Judge of Harris County E.A. LYONS, Individ. and as a Member of the Harris Co. Commissioners Court ROBERT ECKELS, Individ. and as a Member of the Harris Co. Commissioners Court JAMIE BRAY, Individ. and as a Member of the Harris Co. Commissioners Court TOM BASS, Individ. and as a Member of the Harris Co. Commissioners Court	For plaintiff: Virgil H. Barfield 500 Houston Bar Center Bldg. 723 Main Street Houston, Texas 77002 225 Gene Zaboroski: C. Anthony Friloux, Jr. EDDINGTON & FRILOUX 1215 First National Life Bldg. Houston, Texas 77002 227 For defendant: Edward J. Landry, Sr. Asst. Co. Harris County Courthouse Houston, Texas 77002 228

STATISTICAL RECORD	COSTS			DATE	NAME OF RECEIPT NO.	REC.		DISB.	
J.S. 5 mailed	Clerk			7-13-73	Barfield	45	00		
				7/20/73	C/O 1-2			15	00
J.S. 6 mailed	Marshal			7/31/73	S. Ref Ck.	15	00		
				8/1/73	C/O 1-4			15	00
Basis of Action: Constitutionality of state statutes concerning redistricting Injunctive relief	Docket fee			2-7-74	Harris Co. Notice Appeal	5	00		
	Witness fees			2-13-74	C/O 1-25			5	00
Action arose at:	Depositions			3-8-74	Harris Co Amend. Notice	5	00		
				3/15/74	C/O 1-28			5	00

73-H-993 THREE JUDGE COURT REQUESTED

JOHN V. SINGLETON,

DATE	PROCEEDINGS	Date Order/Judgment
7-13-73	Pltf. ORIGINAL COMPLAINT with request for Temporary Restraining Order, filed. SUMMONS not issued due to no service copies.	1
7-20-73	SUMMONS issued on deft. (5 - each issued "Individ. and as member of Harris County Commissioners' Court...")	
7-25-73	RETURN OF SUMMONS on the following, served 7-24-73:	
	Robert Eckels, filed.	4
	William Elliott, filed.	5
	E. A. Lyons, filed.	6
	Tom Bass, filed.	7
7-25-73	(JVS) ORAL ORDER to consolidate C.A. 73-H-1033 with C.A. 73-H-993 entered. Case will be carried under C.A. 73-H-993 and all future pleadings will be filed in C.A. 73-H-993. Parties ntfd. rm.	
7-26-73	RETURN OF SUMMONS on deft. Tom Bass, served 7-25-73, filed.	8
8-3-73	Pltf. BRIEF, filed.	108
	(JVS) HEARING ON APPLICATION FOR TRO: Testimony of witnesses. Court denies TRO.	
8-9-73	RETURN OF SUMMONS on the following, served 8-2-73, filed.:	
	Jamie Bray.	8
	William Elliott.	9
	Harris County Commissioners Court.	10
	Jamie Bray.	11
8-17-73	BRIEF OF PLAINTIFFS, filed.	133 12
8-17-73	(JRB) ORDER, setting up a three judge court to afford opportunity to brief and argue all questions either preliminarily or on the trial of the merits, or otherwise, as that Court thinks. Judges designated: Requesting Judge, Honorable John V. Singleton, Jr., for the Southern District of Texas; District Judge, Honorable Carl Bue, for the Southern District of Texas; Circuit Judge, Honorable Thomas G. Gee, filed. Parties Ntfd. ds	138 13
8-28-73	Pltf. (CA 73-H-1033) FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION, filed. SUMMONS issued on deft. (4).	140
9-6-73	RETURN OF SUMMONS on the following, served 8-31-73, filed:	
	Harris County Commissioners Court as an entity	15
	Tom Bass, Harris County Commissioner.	16
	Bill Elliott, County Judge.	17
9-7-73	Deft. MOTION FOR DISSOLUTION OF THREE-JUDGE PANEL AND MOTION TO DISMISS, filed. M/D 9-17-73.	161

Page 2 of 10

75-H-99

D. C. 1964 Rev. Civil Docket Continuation

JOHN V. SINGLETON, JR.

DATE	PROCEEDINGS	Date Order or Judgment
9-13-73	Pltf. MOTION FOR DEFAULT JUDGMENT, filed. M/D 10-15-73 by clerk.	168
9/17/73	Pltfs' FIRST AMENDED COMPLAINT for Declaratory Relief, filed.	171
9-17-73	In the Moore case, leave is granted to file an amended complaint. In these consolidated cases the attorneys will prepare and submit for filing on or before 5:00 P.M. October 1, 1973, stipulated facts. If there are any disputed facts within this same period of time the attorneys will take, have transcribed, and file depositions and/or answers to written interrogatories relating to any unresolved or unstipulated facts. On or before October 8, 1973 at 5:00 P.M. the attorneys will prepare and file briefs supporting not only their respective contentions on the merits of the case, but also briefs relating to whether or not this is properly a case for determination by a three-judge court. A hearing will be held before the three-judge court on November 15, 1973 at 2:00 P.M. at which hearing the attorneys will be prepared to present oral arguments presenting their respective legal positions. JVSJR. Parties ntfd. rm.	
9-28-73	Agreed Motion for Extension of Time to Complete Discovery, filed.	196
9-28-73	(JVS) ORDER, filed, granting agreed motion for extension of time to complete discovery and submit stipulations of facts to 10-8-73, 5:00 p.m.; submit briefs to 10-15-73. Parties ntfd. mg	199
9/28/73	Return of Summons on Jamie Bray, served 9/18/73, filed.	
10/5/73	Pltf., G Zaboroski's FIRST AMENDED COMPLAINT for injunctive relief, declaratory relief, civil damages and attorney's fees, filed.	200
10/9/73	DEPOSITION of Walter H. Rankin, filed.	
10/9/73	DEPOSITION of Robert Y. Eckels, filed.	
10/9/73	DEPOSITION of Tom Bass, filed.	
10/9/73	DEPOSITION of Blackie Neeley, filed.	
10/9/73	DEPOSITION of Judge Bill Elliott, filed.	
10/9/73	DEPOSITION of Sheriff Jack Heard, Major Tom Pickens and Captain Ellis Ebarb, filed.	
10/9/73	STIPULATION between plaintiffs and defts Elliott, Lyons, Eckels, Bray and Bass, filed.(w/exhibits)	215
10/9/73	Agreed MOTION to Continue Discovery, extending time for discovery, until November 8, 1973, filed.	252
10/15/73	Plaintiff's BRIEF, filed.	
10/15/73	Defts' BRIEF in support of Motion to Dissolve Three Judge Panel and Motion to Dismiss, filed.	257 261
10/16/73	Plaintiff's FIRST AMENDED BRIEF, filed.	
10-18-73	Plaintiff Zaborski's BRIEF in support of Jurisdiction, filed.	292 320
	DEPOSITION of Blackie Neeley, filed.	

73-H- 993

JOHN V. SINGLETON, JR.

Page Two

DATE	PROCEEDINGS	Date of Judgment
11/7/73	JOINT STIPULATION, filed. Stipulating that all evidence, including pretrial discovery evidence, that is admitted by the Court in CA 73-H-993 will also be simultaneously admitted in evidence in CA 73-H-1033.	351
11/12/73	DEPOSITION of Jamie H. Bray, filed.	
12/18/73	Pltf. Zaborowski's SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTION, filed.	353
1-30-74	(JVS)(TG)(COB) ORAL ARGUMENT ON LEGAL POSITION: Argument of counsel. Court takes case under advisement.	
1-30-74	(JVS)(TG)COB) ORDER, filed. Court has jurisdiction; the Texas statute Article 2351½ is facially unconstitutional and the order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is permanently enjoined. An opinion of the court will follow. Parties ntfd. rm.	363
2-1-74	Defts' MOTION FOR STAY OF JUDGMENT AND SUPERSEDEAS, filed.	365
2-1-74	(JVS) ORDER, filed, Defts Motion for a stay pending its appeal to the Supreme Court is denied. Parties ntfd. jab	368
2-4 74	Defts' Notice of Appeal, filed. (To Supreme Court)	369
2-8-74	(JVS, TGG, COB) OPINION, filed. Pltfs are entitled to serve the terms to which they were elected. Insofar only as Article 2351-1/2, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Defts' order of January 30, 1973, undertaking to appoint other persons to pltfs' offices and to prevent pltfs from carrying out their duties and receiving emoluments of their offices during the term to which they were elected, is likewise invalid. Parties ntfd. jab	372
2-8-74	Certified copy of Order of Supreme Court of the U.S. GRANTING Appellant's application for Stay of Dist. Court's Order of 1/30/74 pending further order of the Supreme Court, rec'd & filed.	
3-7-74	Deft's Amended Notice of Appeal to Supreme Court, filed.	376
4-1-74	Reporter's Transcript of Proceedings, filed. Page 1 thru 78	

CONSOLIDATED WITH C.A. 73-H-993 TO BE CARRIED UNDER C.A. 73-H-993 73-H-1

CIVIL DOCKET

UNITED STATES DISTRICT COURT Jury demand date:

D. C. Form No. 106A Rev. JOHN V. SINGLETON, J

TITLE OF CASE	ATTORNEYS
BLACKIE NEELEY VS HARRIS COUNTY COMMISSIONERS COURT AS AN ENTITY; WILLIAM ELLIOTT, Individually and as County Judge of Harris County; JAMIE BRAY, Individually and as a member of the Harris County Commissioners Court. TOM BASS, Individually and as a member of the Harris County Commissioners Court.	For plaintiff: Larry B. Kerfoot GARDNER, TURNER, KERFOOT, & GUY 910 Houston Bar Center Bldg. Houston, Texas 77002 For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk		7-23-73	G, T, K & G	15 00	
J.S. 6 mailed	Marshal		7/26/73	0/0 1-3		15 00
Basis of Action: Constitutionality of state statutes concerning redistricting; Injunctive relief.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

73-H-1033

Page Two.

JOHN V. SINGLETON, J

DATE	PROCEEDINGS	Date Order or Judgment
7-23-73	Pltf. ORIGINAL COMPLAINT, filed. Summons not issued pending receipt of additional service copy and Marshal's service form.	379
7-24-73	SUMMONS issued on deft. (4).	
7-25-73	(JVS) ORAL ORDER to consolidate C.A. 73-H-1033 with C.A. 73-H-993 entered. Case will be carried under C.A. 73-H-993 and all future pleadings will be filed in C.A. 73-H-993. Parties ntfd. rm.	
	MAKE ALL FUTURE ENTRIES IN C.A. 73-H-993	

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

RICHARD E. MOORE, ET. AL.	:	
VS	:	CIVIL ACTION NOS.
HARRIS COUNTY COMMISSIONER COURT, ET. AL.	:	73-H-993 and 73-H-1033

* * * * * * * * * * *

CLERK'S CERTIFICATE

I, V. BAILEY THOMAS, Clerk of the United States District Court for the Southern District of Texas, do hereby certify that the following original exhibits were introduced in evidence upon the trial of the above styled and numbered case:

PLAINTIFFS' EXHIBIT NO: 1 (Small Maps of new Precincts and old Precints);

DEFENDANTS' EXHIBIT NO: 1 (Small map of Harris County; Plan #4 - Moore Plan);

EXHIBITS WITH STIPULATION: (Page 215 of Record);

NOS. 7, 8, and 9 (Large Maps; mounted on cardboard);

and the following ORIGINAL DEPOSITIONS: WALTER H. RANKIN,
ROBERT Y. ECKELS,
TOM BASS,
BLACKIE NEELEY (Copy),
JUDGE BILL ELLIOTT,
SHERIFF JACK HEARD, ET.AL.,
BLACKIE NEELEY (Original),
and JAMIE H. BRAY;

and that the same are transmitted herewith as part of the record on appeal of said case in the SUPREME COURT OF THE UNITED STATES.

TO CERTIFY WHICH, witness my hand and the Seal of said Court at Houston, in said District, this 2nd day of April, 1974.

V. BAILEY THOMAS, CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

By: W. Paul Harriss
W. Paul Harriss,
Chief Deputy Clerk

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

RICHARD E. MOORE, ET AL., *Plaintiffs*

v.

HARRIS COUNTY COMMISSIONERS COURT,
ET AL., *Defendants*

CIVIL ACTION NO. 73-H-993
(CONSOLIDATED WITH NO. 73-H-1033)

STIPULATION

COME NOW RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, JOHN HOWE BOYNTON, GENE ZABOROSKI, and BLACKIE NEELEY, Plaintiffs in the above styled cause, and COUNTY JUDGE WILLIAM ELLIOTT, COUNTY COMMISSIONERS E. A. LYONS, ROBERT ECKELS, JAMIE BRAY and TOM BASS, individually and collectively as the Commissioners Court of Harris County, Texas, Defendants in the above styled cause, and both the Plaintiffs and the Defendants acting by and through their respective undersigned attorneys of record, agree together that the following stipulations are true:

1. That all Plaintiffs and all Defendants are residents or domicillarys of Harris County, Texas.

2. That Plaintiff RICHARD E. MOORE, at the general election in the State of Texas in November of 1972, was duly elected Constable of Precinct No. 7 of Harris

County, Texas, the term of said office beginning January, 1, 1973, and ending December 31, 1976. That the said RICHARD E. MOORE was duly sworn in to serve as Constable of Precinct No. 7 of Harris County, Texas, on January 1, 1973, and served in that capacity through June 30, 1973. That the Defendants acting as the Commissioners Court of Harris County, Texas, on June 28, 1973, passed an Order redistricting said County's Justice of the Peace and Constable precincts, effective July 1, 1973, the intended effect of which Order was to abolish the theretofore existing office of Constable of Precinct No. 7 as then geopraphically located and to re-locate said Constable precinct elsewhere within the County, the further effect of which was, by operation of law, to remove the said RICHARD E. MOORE from his said office.

3. That Plaintiff J. C. BOLTON, at the general election in the State of Texas in November of 1972, was duly elected Constable of Precinct No. 5 of Harris County, Texas, the term of said office beginning January 1, 1973, and ending December 31, 1976. That the said J. C. BOLTON was duly sworn in to serve as Constable of Precinct No. 5 of Harris County, Texas, on January 1, 1973, and served in that capacity through June 30, 1973. That the Defendants acting as the Commissioners Court of Harris County, Texas, on June 28, 1973, passed an Order redistricting said County's Justice of the Peace and Constable precincts, effective July 1, 1973, the intended effect of which Order was to abolish the theretofore existing office of Constable of Precinct No. 5 as then geopraphically located and to re-locate said Constable precinct elsewhere within the County, the further effect of which was, by operation of law, to remove the said J. C. BOLTON from his said office.

4. That Plaintiff VERNON G. DOERING, at the general election in the State of Texas in November of 1970, was duly elected Justice of the Peace of Precinct No. 7 of Harris County, Texas, the term of said office beginning January 1, 1971, and ending December 31, 1974. That the said VERNON G. DOERING was duly sworn in to serve as Justice of the Peace of Precinct No. 7 of Harris County, Texas, on January 1, 1971, and served in that capacity through June 30, 1973. That the Defendants acting as the Commissioners Court of Harris County, Texas, on June 28, 1973, passed an Order redistricting said County's Justice of the Peace and Constable precincts, effective July 1, 1973, the intended effect of which Order was to abolish the theretofore existing office of Justice of the Peace of Precinct No. 7 as then geopraphically located and to re-locate said Justice of the Peace precinct elsewhere within the County, the further effect of which was, by operation of law, to remove the said VERNON G. DOERING from his said office.

5. That Plaintiff J. W. MAHAN, at the general election in the State of Texas in November of 1970, was duly elected Justice of the Peace of Precinct No. 5 of Harris County, Texas, the term of said office beginning January 1, 1971, and ending December 31, 1974. That the said J. W. MAHAN was duly sworn in to serve as Justice of the Peace of Precinct No. 5 of Harris County, Texas, on January 1, 1971, and served in that capacity through June 30, 1973. That the Defendants acting as the Commissioners Court of Harris County, Texas, on June 28, 1973, passed an Order redistricting said County's Justice of the Peace and Constable precincts, effective July 1, 1973, the intended effect of which Order was to abolish the theretofore existing office of Justice of the

Peace of Precinct No. 5 as then geographically located and to re-locate said Justice of the Peace precinct elsewhere within the County, the further effect of which was to remove the said J. W. MAHAN from his said office.

6. That Plaintiff GENE ZABOROSKI, at the general election in the State of Texas in November of 1970, was duly elected Justice of the Peace of Precinct No. 6 of Harris County, Texas, the term of said office beginning January 1, 1971, and ending December 31, 1974. That the said GENE ZABOROSKI was duly sworn in to serve as Justice of the Peace of Precinct No. 6 of Harris County, Texas, on January 1, 1971, and served in that capacity through June 30, 1973. That the Defendants acting as the Commissioners Court of Harris County, Texas, on June 28, 1973, passed an Order redistricting said County's Justice of the Peace and Constable precincts, effective July 1, 1973, the intended effect of which Order was to abolish the theretofore existing office of Constable of Precinct No. 6 as then geographisally located and to re-locate said Justice of the Peace precinct elsewhere within the County, the further effect of which was, by operation of law, to remove the said GENE ZABOROSKI from his said office.

7. That the Orders passed by the Commissioners Court of Harris County, Texas, certified copies of which are submitted herewith as Exhibits as indicated below, and which are pertinent to this cause, are as follows:

Exhibit 1—Order passed June 7, 1973, redistricting the County Commissioner precincts of Harris County, Texas.

Exhibit 2—Order passed June 28, 1973, redistricting the Justice of the Peace and Constable precincts of Harris County, Texas.

Exhibit 3—Order passed June 28, 1973, creating the office of Justice of the Peace, Place 2, in each of the Justice of the Peace Precincts of Harris County, Texas, numbered 2, 3, 4, 5, 6, 7 and 8.

Exhibit 4—Order passed June 28, 1973, appointing various persons to fiill various Justice of the Peace and Constable offices pursuant to the newly districted Justice of the Peace and Constable precincts.

Exhibit 5—Order passed July 5, 1973, appointing a person to fill the office of the Justice of the Peace, Precinct 8, Postion 1.

Exhibit 6—Order passed July 5, 1973, appointing a person to fill the office of Justice of the Peace, Precinct 4, Position 1.

8. That the map exhibit marked Exhibit 7 and submitted herewith, which depicts the Justice of the Peace and Constable precinct lines as they existed prior to the redistricting of said precincts, which took effect July 1, 1973, accurately and truly reflects such precinct lines.

9. That said Exhibit 7 further accurately and truly reffects the population and square mileage area of each of the said Justice of the Peace and Constable precincts shown thereon as they existed prior to the redistricting of said precincts which took effect on July 1, 1973.

10. That the map exhibit marked Exhibit 8 and submitted herewith, which depicts the Justice of the Peace and Constable precinct lines as they now exist after the redistricting of said precincts, which took effect July 1, 1973, accurately and truly reflects such precinct lines.

11. That said Exhibit 8 further accurately and truly reflects the population and square mileage area of the said Justice of the Peace and Constable precincts shown

thereon as they now exist after the redistricting of said precincts, which took effect on July 1, 1973.

12. That the map exhibit marked Exhibit 9 and submitted herewith, which depicts the County Commissioner precinct lines as they now exist after the redistricting of said precincts, which took effect June 7, 1973, accurately and truly reflects such precinct lines.

13. That said Exhibit 9 further accurately and truly reflects the population of each of the said County Commissioner precincts shown thereon as they now exist after the redistricting of said precincts, which took effect on June 7, 1973.

14. The population counts, by census tracts, of each of the Justice of the Peace and Constable precincts, with a breakdown of the Black and Spanish surname population within each such tract, before redistricting of said precincts, which took effect July 1, 1973, as reflected by Exhibit 10, are accurate and true.

15. The population counts, by census tracts, of each of the Justice of the Peace and Constable precincts, with a breakdown of the Black and Spanish surname population within each such tract, after redistricting of said precincts, which took effect July 1, 1973, as reflected by Exhibit 11, are accurate and true.

16. Commissioner Tom Bass was appointed Chairman of a nine-man committee to study redistricting formed by the Harris County Commissioners Court on March 13, 1973.

17. The redistricting plan adopted by the Harris County Commissionrs Court combined a portion of old Justice of the Peace Precinct No. 6 with Justice of the

Peace Precincts Nos. 4, 5 and 7 and a portion of 3 to form the new Justice of the Peace Precinct No. 4.

18. The Redistricting Plan adopted by the Harris County Commissioners Court was adopted by the following vote: in favor, Commissioners Tom Bass, Jamie Bray and Judge William Elliott; opposed, Commissioner E. A. Lyons and Commissioner Robert Eckels.

19. That Plaintiff JOHN HOWE BOYNTON lives within the boundaries of the former Justice of the Peace Precinct No. 7 of Harris County, Texas, and of the new Justice of the Peace Precinct No. 4 of Harris County, Texas. Pursuant to the provisions of Rule 23 (b)(2), Plaintiff, JOHN HOWE BOYNTON, purports to bring this suit on his own behalf and in the behalf of every resident citizen similarly situated in the former Justice of the Peace Precinct No. 7 of Harris County, Texas. Plaintiff would purport that the class of persons involved is so numerous that joinder of all members of the purported class is impracticable, and would further purport that a common question of law and fact exists as to all members of the purported class. Plaintiff would further purport that the Defendants have acted on grounds generally applicable to the purported class, making appropriate final injunctive relief to the purported class as a whole which would benefit the purported class as a whole. Defendants do not in any way concede that this is an appropriate or proper class action.

20. That Plaintiff RICHARD E. MOORE filed suit under Cause No. 948,328, styled Richard E. Moore v. Harris County Commissioners Court, Et. Al., in the 164th Judicial District Court of Harris County, Texas, seeking temporary and permanent relief from the redis-

tricting Order which took effect July 1, 1973, and a temporary injunction was denied said Plaintiff on June 29, 1973. Thereafter, said Plaintiff took a Non-Suit therein.

21. The numbers of Constables and Deputy Constables within each Constable precinct, both before and after the redistricting of said precincts, which took effect July 1, 1973, as reflected in the Affidavit of S. G. Fullerton, County Auditor of Harris County, Texas, submitted herewith as Exhibit 12, are accurate and true.

[6]

The foregoing matters are all stipulated and agreed to by all parties.

The following are matters which were submitted by the Plaintiff Gene Zaboroski for stipulation and agreement but which were and are not stipulated and agreed to by the Defendants:

1. The Harris County Commissioners Court voted to form a redistricting committee in January of 1973. with the avowed intent to redistrict the Justice of the Peace Precincts and Constable Precincts in conformity with the one man—one vote ruling of the United States Supreme Court.

2. Commissioner Tom Bass selected the members who were to make up this committee.

3. This redistricting committee chaired by Commissioner Tom Bass was made up of special interest groups.

4. This redistricting committee considered nine plans, none of which were adopted.

5. The "Tom Bass' Redistricting Plan" as adopted was never considered by the redistricting committee.

6. That the "Tom Bass' Redistricting Plan" as adopted was not disclosed to Commissioners Eckels or Lyons until they arrived at the County Commissioners Court meeting on the morning of June 28, 1973, at which time it was to be approved.

7. That the nominees to fulfill the newly created Justice of the Peace Precincts and Constable Precincts had been predetermined in secret sessions and not disclosed to Commissioners Eckels or Lyons until the nominations during the meeting on the morning of June 28, 1973.

8. No Republicans were appointed to any of the newly created or vacant Justice of the Peace positions or Constable positions.

9. Three Justices of the Peace who were appointed were non-lawyers, to wit: Edd Miller, Bud West, Albert Lee.

10. Appointee Peavy was Judge Elliott's assistant and staff member prior to being appointed as Justice of the Peace.

11. Shelly Hancock is Ralph Yarborough's nephew.

12. The majority of newly appointed Justices of the Peace and Constables were appointed in the geographical areas that fall within the Precincts of Commissioners Bass and Bray.

[7]

13. The "Tom Bass' Redistricting Plan" was adopted by the Harris County Commissioners Court on July 28, 1973, to take effect July 1, 1973.

14. The vacancy created by the new Justice of the Peace Precinct No. 6 was filled by Albert Lee, a democrat.

15. Commissioner E. A. Lyons and Commissioner Robert Eckels voted against the "Tom Bass' Redistricting Plan" because it did not conform to the purposes of one man—one vote.

16. The Harris County Commissioners Court did not check the residency requirements of the persons appointed to fill the newly created Justices of the Peace and Constables.

17. Racial considerations were deliberately used to set up color and ethnic precinct lines.

18. That Commissioners Bass, Bray and Judge Elliott are Democratic office holders; that they are liberal democrats; that their voter support is heavily Black, Mexican American and Labor.

19. That the primary reason for the redistricting and the resultant lines of the precinct was to appoint patronage individuals whose appointment would constitute a political benefit to Commissioners Bray, Bass and Judge Elliott.

20. The entire redistricting committee established by the Harris County Commissioners Court in January of 1973 was a sham, because Commissioner Bass had already decided what plan he wanted along with the other Defendants, that he had prepared his plan in a secret meeting to which Commissioner Lyons and Eckels were not invited.

21. That the entire matter was a conspiracy to favor racial, minority groups and special interest voter groups for political advantage.

22. That the entire plan deliberately eliminated any Republican from appiontment.

23. That the lines in what was old Justice of the Peace Precinct No. 6, and a Republican precinct, is now redistricted so that Gene Zaboroski, or other future Republic candidates, are now placed in a heavily Democratic precinct insuring Democratic party candidates continued election to office.

[8]

24. That the "Tom Bass' Redistricing Plan" as adopted deliberately eliminated a "safe Republican" precinct and created a safe Black and safe Mexican American precincts.

25. That the voter records of the last election of each of the County Commissioners Bass, Bray, and Elliott indicate that the Blacks, Mexican Americans and Union votes delivered a heavy majority toward their reelection.

26. That Commissioners Bass, Bray and Judge Elliott have voted together in partisan matters on the Harris County Commissioners Court since Commissioner Bass' election to the Court in 1966.

27. That the selection of the citizens committee to study redistricting chaired by Commissioner Bass was a sham in that the Commissioner was stacked six to three in favor of persons friendly to and politically compatible with Commissioner Bass.

28. That the redistricting plan adopted by the Harris County Commissioners Court does not conform to the one man—one vote rule.

29. That the appointment of non-lawyers, i.e. Albert Lee, Bud West and Edd Miller negated the Court's majority statement that one basis for the redistricting was to put lawyers in as Justice of the Peace to replace non lawyers.

30. That the actions of appointing the particular persons newly appointed and changing some office holders to new areas was purely politically motivated by the Defendants Bass, Elliott, Bray faction of the Harris County Commissioners Court.

EDWARD J. LANDRY
Edward J. Landry
Attorney in Charge
for Defendants
202 Harris County Courthouse
Houston, Texas 77002
713-228-8311 Ext. 151

MICHAEL R. DAVIS
Michael R. Davis
Of Counsel
for Defendants
202 Harris County Courthouse
Houston, Texas 77002
713-228-8311 Ext. 151

C. ANTHONY FRILOUX, JR.
C. Anthony Friloux, Jr.
Attorney in Charge
For Plaintiff Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
713-227-4141

GERALD A. WOOLF
Gerald A. Woolf
Of Counsel
For Plaintiff Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
713-227-4141

VIRGIL H. BARFIELD
Virgil H. Barfield
Attorney in Charge
For Plaintiffs, Richard E. Moore, et al.
500 Houston Bar Center Building
Houston, Texas 77002
713-225-9257

JOHN G. GILLELAND
John G. Gilleland
Of Counsel
For Plaintiffs, Richard E. Moore, et al.
500 Houston Bar Center Building
Houston, Texas 77002
713-222-6127

DAVID HOLLINGSWORTH
David Hollingsworth
Of Counsel
For Plaintiffs, Richard E. Moore, et al.
500 Houston Bar Center Building
Houston, Texas 77002
713-222-6127

LARRY B. KERFOOT
Larry B. Kerfoot
Attorney in Charge
For Plaintiff Blackie Neeley
910 Houston Bar Center Building
Houston, Texas 77002
713-228-9641

EXHIBIT 10 To THE STIPULATION

BEFORE REDISTRICTING

J P & Constable Pct. 1.

Census Tract	Total pop.	Black	%	Spanish	%
121	3,719	527	14.2	370	9.9
122	4,627	853	18.4	3,582	77.4
123	2,042	182	8.9	1,365	66.8
124	4,822	3,965	82.2	122	2.5
125	1,391	67	4.8	462	33.2
126	7,448	6,280	84.3	216	2.9
201	10,834	10,741	99.1	40	.4
202(most)	4,899	460	9.4	2,454	50.1
203(most)	10,123	1,275	12.6	5,774	57.0
204	4,167	4,105	98.5	19	.5
205	16,235	15,206	93.7	1,071	6.6
206	9,231	8,115	87.9	964	10.4
207	10,159	9,202	90.6	627	6.2
208	14,711	12,803	87.	1,808	12.3
209(part)	219	5	2.3	50	22.7
214(1/2)	1,793	307	17.1	392	21.9
215	16,983	9,080	53.5	1,159	6.8
216	6,796	5,191	76.4	61	0.9
217	11,807	10,194	86.3	1,241	10.5
218	11,190	5,251	46.9	1,566	14.0
219	5,964	2,046	34.3	763	12.8
220	6,904	289	3.2	566	8.2
221	2,478	------	----	245	9.9
225	15,844	10,742	67.8	932	5.9
227	5,818	4	.1	344	5.9
301	10,545	10	.1	5,601	53.1
302	5,813	251	4.3	1,656	28.5
303	3,581	3,410	95.2	108	3.0
304	14,304	14,033	98.1	140	1.0
305	11,318	11,210	99.0	87	.8
306	7,634	6,771	88.7	242	3.2
307	12,519	11,938	95.4	208	1.7
308(1/2)	3,512	735	20.9	291	8.3
309(part)	2,431	20	0.8	439	18.0
310(most)	4,742	9	0.2	2,381	50.2
311	9,356	75	0.8	7,051	75.4
312(most)	5,942	23	0.4	4,434	74.6
314(part)	1,905	684	35.9	172	9.8
315	7,663	5,391	70.4	302	3.9
316	5,544	2,825	51.0	244	4.4
317	15,484	11,078	71.5	923	6.0
334(part)	1,390	77	5.6	208	14.9
401	5,963	433	7.3	1,660	27.8
402	11,551	368	3.2	1,782	15.4
403	7,058	67	.9	744	10.5
404	6,805	39	.6	352	5.2
405	9,340	19	.2	832	8.9
406	5,978	86	1.4	323	5.4
407	10,349	142	1.4	582	5.6
408	3,381	1	---	345	10.2
409	3,963	2	.1	156	3.9
410	5,973	5	.1	323	5.4
411	1,466	1	.1	108	7.4
412	9,956	62	.6	408	4.1
413	8,654	13	.2	677	7.8
414	8,948	23	.3	473	5.3
416	18,611	17	.1	855	4.6
417	12,640	8	.1	774	6.1
418	6,369	2	---	483	7.6
419	14,169	91	.6	1,105	7.8
420	14,091	63	.4	779	5.5

BEFORE REDISTRICTING

JP & Constable, Pct. #1

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
421	3,698	16	.4	201	5.4
422	16,486	31	.2	648	3.9
423	17,616	1,760	10.0	1,593	9.0
424	12,590	15	.1	549	4.4
425	14,397	38	.3	670	4.5
426	7,640	6	.1	414	5.4
433	6,359	289	4.5	298	4.7
434	880	36	4.1	14	1.6
435	5,937	1	---	220	3.7
436	10,457	15	.1	916	8.8
437	146	18	12.3	32	21.9
438	7,795	53	.7	416	5.3
349	3,866	7	.2	126	3.3
440	16,661	24	.1	672	4.0
441	3,847	---	---	75	1.9
442	12,995	35	.3	586	4.5
443	23,189	8	---	1,011	4.4
444	18,175	7	---	496	2.7
445	12,873	7	.1	446	3.5
446	21,046	9	---	882	4.2
447	13,844	10	.1	476	3.4
448	215	5	2.3	26	12.1
449(1/2)	90	6	6.7	11	11.7
450	185	3	1.6	28	15.1
451(part)	68	5	6.6	12	16.8
501	126	56	44.4	131	74.0
502	3,211	2,562	79.8	569	17.7
503	13,777	986	7.2	9,633	69.9
504	4,097	1,678	41.0	1,778	43.4
505	6,220	1,863	30.0	2,583	41.5
506	9,901	50	.5	1,724	17.4
507	8,603	39	.5	1,379	16.0
508	5,925	1,561	26.3	3,207	54.1
509	12,867	2,204	17.1	2,974	23.1
510	6,865	6,263	91.2	137	2.0
511	6,951	18	.3	1,228	17.7
512	7,617	12	.2	789	10.4
513	3,501	371	10.6	534	15.3
514	7,709	4,451	57.7	790	10.2
515	8,023	925	11.5	1,711	21.3
516	7,778	227	2.9	2,245	28.9
517	13,449	260	1.9	486	3.6
518	13,561	2,439	18.0	973	7.2
519	13,602	1,851	13.6	501	3.7
520	12,975	5,621	43.3	808	6.2
521	10,253	14	.1	1,359	13.3
522	11,967	5	----	770	6.4
523	11,908	26	.2	713	6.0
524	2,121	1,964	92.6	92	4.3
525	10,659	8,352	78.4	148	1.4
526	16,491	113	.7	986	6.0
527	9,680	4	---	559	5.8
528	2,033	1,288	63.4	89	4.4
529	4,513	6	.1	21	.5
530	8,929	4,871	54.6	140	1.6
531	13,744	7,771	56.5	520	3.8
532	12,736	6	----	704	5.5
539(part)	449	35	7.8	8	1.8
540	2,102	-----	----	121	5.8

BEFORE REDISTRICTING

J P & CONSTABLE PCT. #1
Page -3-

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
541(most)	1,445	-----	----	30	2.1
542	2,230	997	44.7	324	14.5
543	492	-----	-----	25	5.1
TALS.....	975,140	248,095	25.4	114,376	11.7

BEFORE REDISTRICTING

J P & Constable Pcts. #2

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
202 (part)	1,633	153	9.4	818	50.1
209 (most)	656	15	2.3	149	22.7
210	11,981	10,619	88.6	855	7.1
211	10,516	1,395	13.3	433	4.1
212	9,563	----	---	777	8.1
213	5,311	203	3.8	197	3.7
214 (1/2)	1,793	307	17.1	392	21.9
232					
308 (1/2, 50%)	3,512	735	20.9	291	8.3
309 (1/2, 50%)	7,292	59	.8	1,316	18.0
310 (part) 25%	1,580	3	.2	794	50.2
312 (part) 25%	1,981	8	.4	1,478	74.6
313	9,801	33	.3	1,387	14.2
314 (most) 75%	5,716	2,053	35.9	516	9.8
318	19,071	9,787	51.3	1,850	9.7
319	5,786	15	.3	358	6.2
320	15,447	16	.1	871	5.6
321	11,704	1,664	14.2	3,524	30.1
322	11,760	4	----	915	7.8
323	8,408	16	.2	799	9.5
324	11,900	25	.2	421	3.5
325	9,213	3	----	1,353	14.7
326	7,729	1	----	581	7.5
327	10,399	5,065	48.7	757	7.3
328	16,144	12,351	76.5	974	6.0
329	10,526	10,410	98.9	62	.6
330	5,413	5,257	97.1	122	2.5
331	1,029	20	1.9	96	9.3
332	6,479	1,683	26.0	810	12.5
333	2,742	532	19.4	262	9.6
334 (most)	4,169	232	5.6	622	14.9
335	12,921	259	2.0	1,867	14.4
336	1,253	26	2.1	177	14.1
337	427	67	15.7	53	12.4
338	2,641	21	.8	181	6.9
339	10,017	9,962	99.5	104	1.0
340	7,451	6,834	91.7	56	.8
341	347	73	21.0	20	5.8
342	1,080	---	---	161	14.9
343	7,187	5,149	71.6	152	2.1
344	1,706	1	.1	174	10.2
345	6,601	---	---	245	3.7
346	1,960	---	---	180	9.1
347	18,217	10	.1	1,170	6.4
348	11,527	28	.2	1,965	17.0
349	9,537	6	.1	522	5.5
350	8,877	9	.1	332	3.7
351	4,009	---	---	278	6.9
352	68	---	---	9	13.1
356 (1/2)	6,578	5	.1	829	12.6
357 (most) 75%	14,198	4	---	572	4.0
359 (part) 25%	1,215	---	---	94	7.7
370 (1/2) 50%	373	11	2.8	37	9.9
371	9,490	20	.2	403	4.2
372	596	---	---	21	3.5
373 (most) 75%	7,869	22	.3	406	5.2
374	5,472	6	.1	192	3.5
375	74	---	---	34	45.9
415	14,834	56	.4	526	3.5
427	6,118	3	---	312	5.1
428	8,476	18	.2	145	1.7
429	4,616	15	.3	61	1.3
430	3,439	12	.3	155	4.5

BEFORE REDISTRICTING

J P & Constable Pcts. #2
Page -2-

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
431	6,951	8	.1	177	2.5
432	2,345	6	.3	39	1.7
TOTAL	427,724	85,292	19.9	35,429	8.3

BEFORE REDISTRICTING

Original J.P. & Constable Pct. 3

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
226	3,014	128	4.2	54	1.8
228	3,281	0	0	82	2.5
229	1,790	0	0	219	12.2
230	18,529	9	0	485	2.6
231	6,965	1	0	75	1.1
233	1,596	4	.3	29	1.8
234	2,590	8	.3	183	7.1
235	3,931	2	.1	166	4.2
236	1,747	0	0	0	0
237	625	1	.2	0	0
250	458	0	0	0	0
251	1,917	3	.2	0	0
252	558	4	.7	0	0
253	1,063	136	12.8	43	4.0
254	805	0	0	16	2.0
255	1,681	20	1.2	0	0
256	445	10	2.2	0	0
257	578	1	.2	0	0
258	4,632	2,475	59.3	25	.5
259	6,440	2,016	31.3	76	1.2
260	166	19	11.4	0	0
261	1,814	25	1.4	36	2.0
262	857	17	2.0	297	34.7
263	4,671	4	.1	209	4.5
264	3,366	888	26.4	1,721	51.1
265	1,850	121	6.5	281	15.2
266	4,997	7	.1	316	6.3
267	4,849	19	.4	38	.8
268	1,791	12	.7	0	0
269	6,416	53	.8	158	2.5
270	4,611	31	.7	166	3.6
271	3,170	3	.1	354	11.2
272	4,390	805	18.3	299	6.8
273	4,026	215	5.3	396	9.8
274	1,368	2	.1	0	0
Totals	110,987	7309	6.5	5,724	5.2

BEFORE REDISTRICTING

JP & CONSTABLE, PCT. #4

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
222	6,444	271	4.2	1,317	20.4
223	12,251	600	4.9	2,914	23.8
224	14,239	4,204	29.5	1,150	8.1
238	2,560	---	---	105	4.1
239	5,490	77	1.4	611	11.1
240	8,469	4	---	662	7.8
241	3,821	5	.1	243	6.4
242	865	---	---	---	---
243	1,733	353	19.3	---	---
244	1,901	238	12.5	55	2.9
245	4,490	38	.8	71	1.6
246	1,499	873	58.2	68	4.5
247	332	---	---	53	16.0
248	415	1	.2	28	6.7
249	2,355	25	1.1	89	3.8
533	10,695	14	.1	270	2.5
534	1,734	6	.3	24	1.4
535	282	1	.4	---	---
536	2,304	---	---	137	5.9
TOTALS	81,879	6,692	8.2	7,797	9.5

BEFORE REDISTRICTING

Original J.P. and Constable Pct. 5

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
25% 541 (part)	482	0	0	10	2.1
550	428	8	1.9	0	0
551	1,236	42	3.4	0	0
552	1,191	18	1.5	0	0
553	2,734	309	11.3	31	1.1
554	435	3	.7	0	0
557	460	203	44.1	0	0
Totals	6,966	583	8.4	41	0.6

BEFORE REDISTRICTING

Original J.P. & Constable Pct. 6

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
449 (.25) (part)	45	3	6.7	5	11.1
451 (most) 75%	205	14	6.6	34	16.8
452	2,422	43	1.8	91	3.8
544	37	9	24.3	0	0
545	4,492	0	0	139	3.1
546	399	53	13.3	39	9.8
547	457	132	28.9	0	0
548	352	1	.3	0	0
549	396	41	10.4	18	4.5
Totals	8,805	296	3.4	326	3.7

BEFORE REDISTRICTING

Original J.P. and Constable Pct. 7

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
537	1,283	22	1.7	0	0
538	1,998	173	8.7	114	5.7
539 (most) 75%	1,346	105	7.8	24	1.8
555	941	242	25.7	0	0
556	1,731	1	.1	36	2.1
558	2,508	2	.1	35	1.4
559	2,173	393	18.1	72	3.3
Totals	11,980	938	7.8	281	2.3

BEFORE REDISTRICTING

Original J. P. and Constable Pct. 8

CENSUS TRACT	TOTAL POP.	BLACK	%	SPANISH	%
75%					
352 (most)	206	0	0	27	13.1
353	11,445	5	0	1,471	12.9
354	0	0	0	0	0
355	14,403	5	0.0	651	4.5
356 (1/2)	6,578	5	0.1	830	12.6
(50%					
357 (part)	4,733	2	0.0	191	4.0
25%					
358	4,302	1	0.0	193	4.5
359 (most)	3,646	1	0.0	282	7.7
75%					
360	12,820	1	0.0	362	2.8
361	8	0	0	0	0
362	131	0	0	0	0
363	991	0	0	29	2.9
364	760	17	2.2	7	.9
365	5,740	906	15.8	601	10.5
366	6,791	4	0.1	478	7.0
367	540	0	0.0	32	5.9
368	6,263	7	0.1	145	2.3
369	2,268	27	1.2	117	5.2
370 (1/2)	373	11	2.8	37	9.9
50%					
Totals	81,998	992	1.2	5,453	6.7

EXHIBIT II TO THE STIPULATION

AFTER REDISTRICTING

J P & Constable Pct. 1

Census Tract	Total Pop.	Black	%	Spanish Language	%
121	3,719	527	14.2	370	9.9
125	1,391	67	4.8	462	33.2
126	7,448	6,280	84.3	216	2.9
207	10,159	9,202	90.6	627	6.2
208	14,711	12,803	87.	1,808	12.3
216	6,796	5,191	76.4	61	0.9
217	11,807	10,194	86.3	1,241	10.5
218	11,196	5.251	46.9	1,566	14.0
219	5,964	2,046	34.3	763	12.8
401	5,963	433	7.3	1,660	27.8
402	11,551	368	3.2	1,782	15.4
403	7,058	67	.9	744	10.5
404	6,805	39	.6	352	5.2
405	9,340	19	.2	832	8.9
406	5,978	86	1.4	323	5.4
407	10,349	142	1.4	582	5.6
408	3,381	1	---	345	10.2
409	3.963	2	.1	156	3.9
410	5,973	5	.1	323	5.4
411	1,466	1	.1	108	7.4
412	9,956	62	.6	408	4.1
413	8,654	13	.2	677	7.8
504	4,097	1,678	41.	1,778	43.4
505	6,220	1,863	30.	2,583	41.5
506	9,901	50	.5	1,724	17.4
507	8,603	39	.5	1,379	16.0
509	12,867	2,204	17.1	2.974	23.1
510	6,865	6,263	91.2	137	2.0
511	6,951	18	.3	1,228	17.7
512	7,617	12	.2	789	10.4
513	3,501	371	10.6	534	15.3
514	7,709	4,451	57.7	790	10.2
515	8,023	925	11.5	1,711	21.3
516	7,778	227	2.9	2,245	28.9
517	13,449	260	1.9	486	3.6
518	13,561	2,439	18.	973	7.2
519	13,602	1,851	13.6	501	3.7
520	12,975	5,621	43.3	808	6.2
521	10,253	14	.1	1,359	13.3
526	16,491	113	.7	986	6.0
527	9,680	4	---	559	5.8
Totals	343,765	81,202	23.6	38,950	11.3

Constables & J P Pct. 2 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
209	875	20	2.3	199	22.7
210	11,981	10,619	88.6	855	7.1
211	10,516	11,395	13.3	433	4.1
212	9,563	----	----	777	8.1
213	5,311	203	3.8	197	3.7
214	3,586	614	17.1	784	21.9
232	5,750	----	----	182	3.2
320	15,447	16	.1	871	5.6
322	11,760	4	----	951	7.8
323	8,408	16	.2	799	9.5
324	11,900	25	.2	421	3.5
326	7,729	)	----	581	7.5
344	1,706	1	.1	174	10.2
345	6,601	----	----	245	3.7
346	1,970	----	----	180	9.1
349	9,537	6	1	522	5.5
350	8,877	9	0.1	332	3.7
351	4,009	----	----	278	6.9
352	274	----	----	36	13.1
371	9,490	20	0.2	403	4.2
372	594	----	----	21	3.5
375	74	0	----	34	45.9
Totals	145,960	12,949	8.9	9,239	6.3

J P & Constables Pct. 3 (After)

Census Tract	Total Pop.	Blacks	%	Spanish Language	%
215	16,983	9,080	53.5	1,159	6.8
224	14,239	4,204	29.5	1,150	8.1
225	15,844	10,742	67.8	932	5.9
226	3,014	128	4.2	54	1.8
227	5,818	4	.1	344	5.9
228	3,281	0	----	82	2.5
229	1,790	0	----	219	12.2
230	18,529	9	----	485	2.6
231	6,965	1	----	75	1.1
233	1,596	4	.3	29	1.8
234	2,590	8	.3	183	7.1
235	3,931	2	.1	166	4.2
236	1,747	0	----	0	---
237	625	1	.2	0	---
238	2,560	0	----	105	4.1
239	5,490	77	1.4	611	11.1
247	332	0	----	53	16.0
252	558	4	.7	0	----
253	1,063	136	12.8	43	4.0
254	805	0	----	16	2.0
255	1,681	20	1.2	0	---
256	445	10	2.2	0	---
257	578	1	0.2	0	---
258	4,632	2,745	59.3	25	.5
259	6,440	2,016	31.3	76	1.2
260	166	19	11.4	0	---
261	1,814	25	1.4	36	2.0
262	857	17	2.0	297	34.7
263	4,671	4	0.1	209	4.5
264	3,366	888	26.4	1,721	51.1
265	1,850	121	6.5	281	15.2
266	4,997	7	.1	316	6.3
267	4,849	19	.4	38	.8
268	1,791	12	0.7	-----	---
269	6,416	53	0.8	158	2.5
270	4,611	31	0.7	166	3.6
271	3,170	3	.1	354	11.2
272	4,390	805	18.3	299	6.8
273	4,026	215	5.3	396	9.8
274	1,368	2	0.1	----	---
275	81	0	----	----	---
Totals	169,959	31,413	18.5	10,078	5.9

J P & Constables Pct. 4 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
220	6,904	219	3.2	566	8.2
221	2,478	---	---	245	9.9
222	6,444	271	4.2	1,317	20.4
223	12,251	600	4.9	2,914	23.8
240	8,469	4	---	662	7.8
241	3,821	5	.1	243	6.4
242	865	---	---	---	---
243	1,733	335	19.3	---	---
244	1,901	238	12.5	55	2.9
245	4,490	38	.8	71	1.6
246	1,499	873	58.2	68	4.5
248	415	1	.2	28	6.7
249	2,355	25	1.1	89	3.8
250	458	---	---	---	---
251	1,917	3	0.2	---	---
522	11,967	5	---	770	6.4
523	11,908	26	0.2	713	6.0
524	2,121	1,964	92.6	92	4.3
525	10,659	8,352	78.4	148	1.4
529	4,513	6	0.1	21	.5
530	8,929	4,871	54.6	140	1.6
531	13,744	~~7,771~~ 7,716	56.5	520	3.8
532	12,736	6	---	704	5.5
533	10,695	14	0.1	270	2.5
534	1,734	6	.3	24	1.4
535	282	1	.4	---	---
536	2,304	-----	----	137	5.9
537	1,283	22	1.7	---	---
538	1,994	173	8.7	114	5.7
539	1,795	140	7.8	32	1.8
540	2,102	----	---	121	5.8
541	1,926	----	---	40	2.1
545	4,492	----	---	139	3.1
548	352	1	.3	---	---
549	396	41	10.4	18	4.5
550	428	8	1.9	---	---
551	1,236	42	3.4	---	---
552	1,191	18	1.5	---	---
553	2,734	309	11.3	31	1.1
554	435	3	.7	---	---
555	941	242	25.7	---	---
556	1,731	1	.1	36	2.1
557	460	203	44.1	---	---
558	2,508	2	.1	35	1.4
559	2,173	393	18.1	72	3.3
Totals	175,769	~~27,252~~ 27,247	15.5	10,435	0.6

J P & Constable Pct 5 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
416	18,611	17	0.1	855	4.6
417	12,640	8	0.1	774	6.1
418	6,369	2	---	483	7.6
419	14,169	91	0.6	1,105	7.8
420	14,091	63	0.4	779	5.5
421	3,698	16	0.4	201	5.4
422	16,486	31	0.2	648	3.9
423	17,616	1,760	10.0	1,593	9.0
424	12,590	15	0.1	549	4.4
425	14,997	38	0.3	670	4.5
426	7,640	6	0.1	414	5.4
427	6,118	3	---	312	5.1
428	8,476	18	0.2	145	1.7
429	4,616	15	0.3	61	1.3
430	3,439	12	0.3	155	4.5
431	6,951	8	0.1	177	2.5
432	2,345	6	0.3	39	1.7
433	6,359	289	4.5	298	4.7
434	880	36	4.1	14	1.6
435	5,937	1	---	220	3.7
436	10,457	15	0.1	916	8.8
437	146	18	12.3	32	21.9
438	7,795	53	0.7	416	5.3
439	3,866	7	0.2	126	3.3
440	16,661	24	0.1	672	4.0
441	3,847	---	---	75	1.9
442	12,995	35	0.3	586	4.5
443	23,189	8	---	1,011	4.4
444	18,175	7	---	496	2.7
445	12,873	7	0.1	446	3.5
446	21,046	9	---	882	4.2
447	13,844	10	0.1	476	3.4
448	215	5	2.3	26	12.1
449	179	12	6.7	21	11.7
450	185	3	1.6	28	15.1
451	273	18	6.6	46	16.8
452	2,422	43	1.8	91	3.8
528	2,033	1,288	63.4	89	4.4
542	2,230	997	44.7	324	14.5
543	492	---	---	25	5.1
544	37	9	24.3	---	---
546	399	53	13.3	39	9.8
547	457	132	28.9	---	---
Totals	337,844	5,188	1.5	16,315	4.8

J P & Constable Pct. 6 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
122	4,627	853	18.4	3,582	77.4
123	2,042	182	8.9	1,365	66.8
201	10,834	10,741	99.1	40	.4
202	6,532	613	9.4	3,272	50.1
203	13,497	1,700	12.6	7,699	57.0
204	4,167	4,105	98.5	19	.5
205	16,235	15,206	93.7	1,071	6.6
206	9,231	8,115	87.9	964	10.4
301	10,545	10	.1	5,601	53.1
302	5,813	251	4.3	1,656	28.5
303	3,581	3,410	95.2	108	3.0
309	9,723	79	0.8	1,754	18.0
310	6,322	12	0.2	3,175	50.2
311	9,356	75	0.8	7,051	75.4
312	7,923	31	0.4	5,912	74.6
313	9,801	33	0.3	1,387	14.2
319	5,786	15	0.3	358	6.2
321	11,704	1,664	14.2	3,524	30.1
325	9,213	3	----	1,355	14.7
501	126	56	44.4	131	74.0
502	3,211	2,562	79.8	569	17.7
503	13,777	986	7.2	9,633	69.9
508	5,925	1,561	26.3	3,207	54.1
Totals	179,971	52,263	29.0	63,431	35.2

J P & Constable Pct. 7 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
124	4,822	3,965	82.2	122	2.5
304	14,304	14,033	98.1	140	1.0
305	11,318	11,210	99.0	87	.8
306	7,634	6,771	88.7	242	3.2
307	12,519	11,938	95.4	208	1.7
308	7,024	1,470	20.9	582	8.3
314	7,621	2,737	35.9	688	9.8
315	7,663	5,391	70.4	302	3.9
316	5,544	2,825	51.0	244	4.4
317	15,484	11,078	71.5	923	6.0
318	19,071	9,787	51.3	1,850	9.7
327	10,399	5,065	48.7	757	7.3
328	16,144	12,351	76.5	974	6.0
329	10,526	10,410	98.9	62	.6
330	5,413	5,257	97.1	122	2.3
331	1,029	20	1.9	96	9.3
332	6,479	1,683	26.0	810	12.5
333	2,742	532	19.4	262	9.6
334	5,559	309	5.6	830	14.9
335	12,921	259	2.0	1,867	14.4
336	1,253	26	2.1	177	14.1
337	427	67	15.7	53	12.4
338	2,641	21	0.8	181	6.9
339	10,017	9,962	99.5	104	1.0
340	7,451	6,834	91.7	56	0.8
341	347	73	21.0	20	5.8
342	1,080	-----	----	161	14.9
343	7,187	5,149	71.6	152	2.1
414	8,948	23	0.3	473	5.3
415	14,834	56	0.4	526	3.5
Totals	238,401	139,302	58.4	13,071	5.5

J P & Constable Pct. 8 (After)

Census Tract	Total Pop.	Black	%	Spanish Language	%
347	18,217	10	0.1	1,170	6.4
348	11,527	28	0.2	1.965	17.0
353	11,445	5	---	1,471	12.9
354	------	--	---	-----	---
355	14,403	5	---	651	4.5
356	13,155	9	0.1	1,659	12.6
357	18,931	6	0.0	763	4.0
358	4,302	1	0.0	193	4.5
359	4,851	1	0.0	376	7.7
360	12,820	1	0.0	362	2.8
361	8	--	---	-----	---
362	131	---	---	-----	---
363	991	--	---	29	2.9
364	760	17	2.2	7	0.9
365	5,740	960	15.8	601	10.5
366	6,791	4	0.1	478	7.0
367	540	--	---	32	5.9
368	6,263	7	0.1	145	2.3
369	2,268	27	1.2	117	5.2
370	746	21	2.8	74	9.9
373	10,492	30	0.3	541	5.2
374	5,472	6	0.1	192	3.5
Totals	149,863	1,084	.7	10,826	7.2

Total Pop..... ~~1,741,632~~ 1,774,912

Spanish Language... 172,345

Black..... ~~350,638~~ 350,668

% Black..... 20.1

% Sp. Language..... 9.9

[5]

DEPOSITION TESTIMONY OF COUNTY COMMISSIONER ROBERT Y. ECKELS

Q. For the record, please state your name.

A. Robert Y. Eckels.

Q. Mr. Eckels, you are a Commissioner of Harris County?

A. Precinct 3.

Q. Precinct 3. I am Virgil Barfield, I am with Mr. John Gilleland, we represent the plaintiffs in this cause. Now, then, I have a few questions I want to ask you in regard to a redistricting plan that went into effect in June, 1973. You were a Commissioner of Harris County at that time, were you not?

A. I was.

Q. Mr. Eckels, were you familiar with a committee formed early in 1973 for the purposes of redistricting?

A. I was.

Q. Did you have any vote in the forming of or the appointment of that committee?

[6]

Q. That will be fine. What was the purpose of this committee?

A. The purpose submitted to the Court was to comply with the one man, one vote rule, and to equalize the precincts of constables and J.P.'s and County

[7]

Q. Based on this committee, or the constitution of this committee, is it a fair statement to say there were

members of the Republican Party, the Democratic Party, the Black community, the Latin-American community, the women in the community, the constables and the justices of the peace of the community?

A. Yes, in my opinion.

Q. In your personal opinion, would you constitute, or would you say it is a special interest group constituting this committee?

A. I think the special interest groups were represented. I felt like the composition of it was stacked toward the motivation that I felt like ultimately surfaced in the formation of the committee. Off the record.

(At this time there was a brief discussion off the record, after which

* * *

[8]

Q. Are you familiar with the plan called the Bill Williams Plan, or a Plan 9?

A. Only in that he presented a plan.

Q. Mr. Bill Williams?

A. Yes.

Q. Do you know whether or not this was the plan that was submitted by the committee to the Harris County Commissioners Court for approval?

A. I don't recall which plan was presented to the Court, as such, there were so many changes. I know that in my inquiry, the first time the plan of this phase was presented, and it was held back and then coming back and forth, and then in the final presentation, the lines were changed by Commissioner Bass without consultation with anyone.

Q. I see. Then the ultimate plan that was adopted, voted on, on June 28—I believe, 1973?

A. Yes.

[9]

Bass himself, is that a fair statement?

A. Yes, and different from any other plan presented by anyone else.

Q. I see. Let me ask you, how did you vote on the plan presented by Mr. Bass?

A. I voted against it.

Q. Do you know from your own personal knowledge how any of the other Commissioners voted?

A. There were three votes for it and two votes against it.

Q. Two votes dissenting, one of them being yours?

A. Mine was a dissenting vote. May we go off the

* * *

record?

Q. Do you have any personal knowledge of the—of a purpose of this committee to create a precinct for Blacks or for Latin-Americans?

A. The only apparent changes were for this purpose for creating precincts in the Black and Latin-American areas. They did not, in my judgment, materially affect the one man, one vote rule. In summary, it was not done on the basis of a one man, one vote; they did not equalize the

[10]

districts.

Q. Based on your opinion as a Commissioner, do you feel that the redistricting order of June 28th was in order to create a Black precinct or a Latin-American precinct, and not for the benefit and convenience of the citizens of Harris County, Texas?

A. I feel very strongly this is the apparent reason for it.

[11]

Q. Three justices of the peace. Do you feel that the change of the boundaries dissolving the Precincts 5, 7 and 4 into one Precinct 4 is for the convenience of the people?

A. No, I do not.

[12]

Q. Arising out of any conversation or contact with the committee, was it ever brought to your attention that the purpose of this or ultimate goal of this committee was to form a Black precinct?

A. Among other minority interest groups, yes.

Q. Including Latin-Americans?

A. Yes, this was the opinion that appeared more and more through the course of their meetings.

Q. When the plan came to an ultimate vote before the Harris County Commissioners Court, was there ever any mention of the creation of a Black or minority member of the community for justice of the peace and constable?

A. The Tom Bass Plan, that is the one he conceived without the committee, but the one that was presented was the topic of discussions between several of us, that this was the apparent purpose it did not follow the one

man, one vote rule, but did apparently create districts for special interests and minority groups.

[13]

Q. The Tom Bass Plan, then—let me rephrase the question. Was there ever any mention or any recommendations among the Commissioners Court itself at which you were present, in regards to districting along these lines?

A. Yes.

Q. Along these lines, meaning for the benefit of a minority group?

A. There was considerable discussion when it was presented for approval. The conversation being that its apparent purpose was not in its original intention as stated, which is the one man, one vote rule, and there was strong argument to try not to get it.

Q. Of the majority of the commission, did they ever indicate to you in any manner whatsoever this was their intent?

A. As best I can recall, the strongest allegations that would have been made to this, when I made the accusation, "Well, is there anything wrong with that;" outside of that, I can recall no specific instances.

Q. Excuse me, when you say, "Was there anything wrong with that"—

A. My argument to the proponents of the changes on

[14]

the basis this is strictly on a race and special interest group.

Q. And their answer to that?

A. "Was there anything wrong with that."

Q. With setting it up for the minority groups?

A. Yes.

Q. I understand. Do you feel that the Tom Bass Plan that is presently in effect, effectively applies the one man, one vote rule, which was the ultimate goal of the committee majority?

A. In no way.

Q. Was there any discussion as to the time element at which this redistricting plan was to be put into effect?

A. Not until it came to Court for its final time, when they said it was going to be effective that day, and very poor judgment, in my thinking, to do it in that fashion. I was not aware of any immediate changes of this type, it was my opinion until that day that it wouldn't be effective until the first of the year or until the next election.

Q. Then it was your understanding any order to be entered was to be effective at the next general election, not shortly after the general election of 1972 at which time these constables and

[15]

justices of the peace had just been elected?

A. Yes, I had considered it unconstitutional to move a man out of office, and it was my understanding from the incept of this program that it would not be effective until the election or the first of the year following the election.

Q. I see. Was this pointed out, or was this point argued before the full commission?

A. It was disputed at the time the plan was presented.

* * *

A. The timing of it, that it should not take place until after the next county election.

Q. Would you have any knowledge of whether or not there was any discussion as to —after the order

[16]

went into effect as to who was going to be appointed to the new positions, should vacancies exist after the new order?

A. Yes, there was discussion on the new vacancies. I was involved in some of it, some of it came to the table without my knowledge.

Q. Was there any discussion made in regard to the appointment of a minority to these vacancies?

A. Yes.

Q. Was this before the Harris County Commissioners Court itself, or the committee, where were these discussions?

A. In personnel conference of the Court.

Q. For the benefit of myself and others, what is a personnel conference?

A. Behind closed doors.

* * *

Q. Was any indication given that the appointment of a Black or a minority group to these newly created vacancies was for the purpose of their re-election at a later date?

A. Yes.

[17]

Q. Was this in any way the purpose of those voting to place them in office?

A. In my opinion, it was.

Q. In your opinion. Do you feel—in your personal opinion, do you feel that the installation of a minority member in those newly created vacancies enhanced their chances for re-election in the next general election?

A. I would feel it does, yes.

Q. Do you feel that this move in regards to the re-districting, creation of vacancies, is to enhance—to place and enhance the chances for re-election to the office of justice of the peace and constable?

A. Yes.

* * *

Questions by Mr. Kerfoot:

Q. I have just one question, Commissioner. We went through a moment ago about the conversation that occurred in reference to should the order be implemented immediately or should there be a time lag, so to speak. Was a portion of that discussion in any way related to the right of the people to have their vote?

[18]

A. There was considerable discussion on my part on depriving people of their right to representation more so than the right to vote. You were taking people out of office that had been voted in, and in my opinion, had a contract with the voters, and you were violating this contract between the elected official and the voters, in my opinion.

* * *

tion of the plan and voting on it, to your knowledge was there any reason given why, or did any evidence occur

why this be done, were there any circumstances that prevented the Court from having a time lag?

A. The only comments I can recall was that it needed to be done now, as far away from the county elections as possible, so the dust could settle and not have controversy—the dust would have

[19]

time to settle before elections. I think in Gene Zaboroski's case, as several others, I think there were obvious, because you had elected officials serving in an area they had been elected in, they were displaced and people outside the election appointed to fill the vacancies. Specifically, my very good friend, Shelly Hancock was appointed to fill a vacancy that Gene Zaboroski, or the justice of the peace at Tomball—what is his name? Joe Mahan, living in the area, but they were not appointed to fulfill those vacancies.

Q. Do you know of any reason why Commissioners Court could not have implemented a time lag, do you know of anything standing in the way, to prevent them?

A. I think they should have.

Q. You don't know of anything that would have prevented them from doing it?

A. I know of no reason why they couldn't have except the vote was three to two against it.

[20]

Q. All right, now, as I understand your objection to the present plan in effect, as adopted by the Commissioners Court on June 28, 1973, with regard to the justices of the peace and constables, that objection is the fact that it did not follow the arithmetical exactness of

[21]

the one man, one vote concept?

A. That, plus the gerrymandering of the boundaries to represent ethnic groups, plus the installation of it at the time.

* * *

Q. And what do you base your objection to that particular kind of redistricting, as to those two particular precincts?

A. I don't think that it is good to isolate a community in any way, shape or form because of their ethnic positions in the community. I don't think you should insulate a Black community from the total, I don't think that you should insulate a Jewish community from the total. I don't think it is the way you are going to have people living together in harmony; I think if you can have a free flow and working together, then you will.

[22]

Q. Do you not think that in a precinct, and assuming one of the precincts is predominately Black and one of the precincts is predominately Brown, to use that color term very generally, do you not think there is a community of interest in, say, one particular precinct which is predominately Black which might be served best by a justice of the peace who might be appointed or who might be Black that might be appointed, and of the constable who might be Black who might be appointed?

A. I think you are definitely doing a disservice to that community, to restrict them in that fashion. I don't think that the Black or Brown of an individual would keep

any qualified individual from becoming an elected official, I think you will find in any position, you will find in an area of balance, that the white people will accept a Black, and a Black will accept a white or Brown or purple, or anything else, as long as they are qualified to fulfill that job, I think you will better serve the needs of the people by treating them all alike.

[23]

Q. How is that harmful to those people?

A. I didn't say harmful other than to the extent it does limit them with the color. I am saying if you were to design the precincts on a one man, one vote basis, as to convenience of the community of the locations, other than just basing it strictly on ethnic purposes, you are going to have a community that will live together and try to erase the color line that is now creating so many problems in the community.

Q. How do you feel, or why do you feel that the present redistricting plan is not for the convenience of the people?

A. Do we have until about 10:00 o'clock?

Q. Yes, sir, if that is what it will take.

(At this time, Counsel Gilleland entered, and was present for the balance of the deposition, which continued as follows:

A. Number one, the implementation of the plan at

[24]

the time that it was put in immediately was expensive. Number two, it was confusing. Number three, it was very

disruptive to the process that the justices of the peace and constables were elected to accomplish. I think that the plan tore at the roots of various communities, particularly your rural areas, without any opportunity for better planning to replace them.

[27]

Q. To summarize your objections to the new redistricting plan, you stated one, it did not adhere to the one man, one vote concept, was one objection?

[28]

A. Right.

Q. Two, it was your impression that the ultimate goal not only of the committee but of the Court as well, was to form two minority precincts?

A. Well, of the majority of the Court. I object—

Q. The majority.

A. I object to the gerrymandering of the boundaries on an ethnic basis.

* * *

A. There are other objections besides those two.

Q. Which I hope in summarizing to take up. Notwithstanding the fact the one man, one vote concept

[29]

Q. Any other objections? One, it was expensive, two, confusing, three, disruptive.

A. Yes, and I think it was a breach of the contract of

the voters and officials they elected, the timing I think was grossly unjust.

* * *

Q. Would that have required gerrymandering lines in order to achieve the one man, one vote?

A. When it became obvious the one man, one vote concept was not the purpose, then it was my feeling we shouldn't do it at all. You ask did I have a plan, I did not put a pencil on a map and draw it, no, I said, "No, what we have is better for the community than what you are proposing."

[30]

Q. I see. Let me direct your attention back to the June 28th meeting. How much advance notice did you have before you actually had to vote on the plan called the Tom Bass Plan, in effect right now?

A. I believe it was published in the paper. Was

[31]

that after the meeting? I was not aware of it before I walked into the Court session, and it was published immediately thereafter, somebody showed me some clippings, I don't know if the day before or day after. I was not aware of any changes that had gone into that until I walked into the meeting, and the plan had been changed so many times.

Q. I see. The final plan that was ultimately voted on, you had very little time to study, is that a fair statement?

A. Yes.

DEPOSITION TESTIMONY OF COUNTY COMMISSIONER TOM BASS

[12]

A. Yes. Well, Bill Williams's Plan was the one we ended up submitting as the committee proposal.

Q. That, I believe, passed by a five to three majority, with you abstaining?

A. Right.

Q. And after the Bill Williams Plan or Plan 9 or Exhibit 9, I believe, shown here was submitted, then slight alterations were made in the plan prior—

A. That plan was submitted in toto.

Q. Yes, sir.

A. And then additional plans were submitted which were slightly alternative, some were considerably alternative, I think two or three additional plans submitted after that.

Q. Okay, was this by the committee or other persons?

A. No, that was by me.

Q. Okay, but just for the purposes of the record, Plan 9 was the one submitted or voted by the

[13]

committee?

A. Right.

Q. But other alternate plans submitted by yourself or considered by the Court?

A. Right.

Q. And ultimately the plan, the—

A. The Bass Plan.

Q. Or the exhibit marked No. 2 was the one selected by the—

A. Court, right.

* * *

Q. Which ethnic group predominates, if any does, within the Tom Bass Plan as it now exists, within Precinct 6?

A. I don't think you will find Precinct 6 has one ethnic group dominating, but I think you will find the Chicano percentage pretty heavy in that group.

* * *

Q. Precinct 7, would it be a fair statement to state

[14]

that the Blacks would be predominately within that precinct?

A. Yes.

Q. I believe at the hearings, do you recall any percentages quoted?

A. I really hate to say what, they were available, but pulling it out of the air, I could say seventy-five percent to twenty-five percent.

Q. Would 62.5 percent sound right?

A. That is probably right, yes.

Q. As generally, as the plan was passed by the Commissioners Court on June 28, 1973?

A. Yes.

[15]

Q. At that meeting with Mr. Hernandez, was there some concern about the Mexican-American population of that Precinct 6?

A. Oh, yes.

Q. Not being adequate or perhaps there were more either Black, or let's say Black?

A. That was a meeting that lasted about three hours, and all kind of ideas were advanced, it would be hard to summarize, but it would be safe to say they were interested in Precinct 6.

[16]

Q. Just for the purposes of the record, was Precinct 7, in your opinion, based so as to provide a precinct, justice precinct, where Negroes or Blacks could be assured of continuing in office after an election?

A. Well, if you are asking me is that one of the things we knew and considered, the answer is yes. If you ask if that was the primary thing, the answer is no.

Q. No, I am asking you—

A. It was one of the factors considered, yes.

Q. All right, I believe these are your figures on there (indicating)?

A. Right.

Q. 238,401 population in Precinct 7. With reference to Precinct 6 as it now exists, could you tell the Court whether or not the consideration in drawing the boundaries of Precinct 6 shown here was so that the Mexican-American population would, while not being in the majority, would be predominate within that precinct?

A. As a factor among a community of interest and regional representation, closer to one man, one vote, many factors, yes.

Q. You took into consideration one man, one vote?

[17]

A. That was taken into consideration. As a matter of

fact, it originally was the major consideration until we got legal opinion that the justice of the peace precincts were not bound by the one man, one vote, and for particular circumstances, we modified that somewhat.

Q. You used the constitutional provisions of the Constitution of the State of Texas as convenience for guidelines?

A. Yes.

Q. Would you say guidelines for convenience rather than one man, one vote would be the guideline in drafting, voting and ultimately redistricting various justice of the peace precinct lines?

A. There were four or five considerations, I cannot tell you the most important consideration. I tell you one that has not been mentioned I thought was very important, that is at the last Legislative session, they had redrawn the house and senate districts on census tracts, and certainly the justice of the peace and constable precincts were not drawn on census tracts. It is certainly easier for the voter, for the clerk, handling voting precincts, if you have the same type of boundaries, or political boundaries. One of the

[18]

considerations was to draw boundaries on census tracts.

Q. I believe you stated, too, at a public hearing you gave population—

A. Right, but another consideration was to approach the one man, one vote, third was to look at possibilities of minority representation; fourth to provide regional services, a lot of factors.

Q. Correct me if I am incorrect, but let me have the population you wrote on the plan as adopted and marked

Exhibit 2, Precinct 7, new Precinct 7, shows 238,401 residents?

A. Right, those are 1970 census figures.

Q. All right, Precinct 6 reflects 180,101?

A. Right.

Q. And Precinct 2 reflects 146,054?

A. Right.

Q. Precinct 8 reflects 149,681?

A. Right.

Q. And Precinct 3 reflects 170,997?

A. Right.

Q. Precinct 1 reflects 342,374?

A. Right.

Q. And Precinct 4 reflects 175,769?

A. Right.

[19]

Q. And Precinct 5 reflects 334,844?

A. Right.

Q. Those are the populations as they now exist after June 23rd?

A. 28th.

Q. June 28, 1973, as reflected by the 1970 Federal census, is that correct?

A. Right.

Q. Now, then, the one man, one vote rule was not applied, as is obvious—

A. No, the Court—

Q. —it was brought more in balance, but not applied strictly?

A. Yes.

* * *

Q. It is certainly in terms of distance, now, or miles from the various offices and sub-offices of any precinct, it is certainly not as convenient for a person residing in Precinct 4 generally as it would be for Precinct 2 or Precinct 6, would that be a fair statement, Mr. Bass?

A. As of this particular time, the statement is

[20]

probably fair, yes. As of when this thing is fully implemented, I am not quite sure; for example, one of the proposals we have already presented and hope to do is in Acres Homes, which is in Precinct 4, have the justice of the peace and a facility he doesn't operate every day of the week, but he comes and hears about once a week.

[21]

Q. In terms of square miles, accepting my figuring is correct, does 515 square miles appear to be approximately the square miles in Precinct 4?

A. I would take your figures for that, I have no idea.

Q. It would be obvious, then, in square miles Precinct 6 would be less than one-tenth?

A. I wouldn't quarrel, whether it be one-tenth or one-fifth, but certainly smaller.

Q. What does it appear to you to be?

A. I don't know, but if it is one-tenth, it is one-tenth, certainly it is a lot smaller.

Q. Likewise Precinct 7?

A. Yes.

Q. It is a lot smaller in area than Precinct 4?

A. Right.

Q. The total populations, combined populations of Precinct 6 and 7, would you add those up, sir?

A. About—238,000 and 180,000 would be 418,000, almost.

[22]

Q. Safe to say 500,000 in round figures?

A. Okay.

Q. So, you have two precincts in downtown Houston?

A. Yes.

Q. Combining Precincts 7 and 6, would the total area or land area of 7 and 6 be equivalent to Precinct 5, which has 334,844?

A. No, I don't think so.

Q. Would it, in your opinion, be equivalent to—Precinct 6 and 7 be equivalent to Precinct 4 in land area?

A. No.

Q. And—

A. Be more, considerably more population.

Q. Greater than in Precinct 5, it would be approximately 85,000 more or 90,000 more in Precincts 6 and 7 than in 5?

A. Probably.

[25]

Q. There was no emergency in redistricting?

A. It depends on what is an emergency or overdue.

Q. You were under no legal or judicial mandate to redistrict?

A. Not at that time.

Q. Is that correct, so this was something that was done because the majority of the Court felt, in their judgment, should be done, would that be a fair statement?

A. Yes.

[26]

Q. Could there have been a drafting of boundary lines along census tracts for the J.P. precincts which could have resulted in less than a ten percent deviation within each J.P. and constable precinct?

A. Yes.

[27]

Q. To what consideration was given for the convenience of the people?

A. Oh, I would think this was probably the major criteria. As I said in my publication, as I said in my newsletter I mailed to the people, the original concept way back went way back to 1876, and the purpose was convenience for the people, to provide regional facilities and services for

[28]

the people, so when we got through with this thing, we would have a minimum of sixteen regional facilities in the county, where at the present time we had eight—or prior to redistricting we had eight; definitely that was a factor, probably as important as any single factor.

[30]

Q. I believe when the proposal was made by you or a motion made, an opportunity was given to all persons attending the meeting to discuss the pros and cons or give their opinions and views, is that correct, as you recall?

A. I am trying to think, that was about the fourth or fifth time that doggone thing had come before the Court,

even before the Court we had plenty of public comments, I believe even that last time we had testimony from the public.

Q. I believe that is correct. State whether or not

[31]

you stated at that meeting, this would give an opportunity in redistricting to have a J.P. consisting of Blacks?

A. Yes.

Q. And Chicanos, and that—

A. In addition to male and female, right, and white.

Q. But that they may continue in office, giving them an opportunity to continue in office?

A. I am sure if you have got my statement there, you probably have it, I don't remember that particular phrase. How does it read?

Q. I don't have that available, I have it on tape, I didn't bring the tape.

A. I have statements made, I can look at it, I don't recall the exact phrasing at that point in time, so I don't want to say yes or no. Here is what I said, "We are attempting to make it more reflective of the general public by filling vacancies with black, brown and white, in addition to male and female in districts of realistic population variances containing a community of interests. In short, we are attempting to yank the JP/contable system from the depths of ridicule to the position of a vital contributing part of our judicial system." I don't recall

[32]

that statement.

Q. With reference to Precinct 7, in addition to the other things you outlined, you were aware Precinct 7 lines

as they became as of June 28, 1973, a Black would continue in office as a result of the simple majority?

A. I think it is a safe statement to say I was aware a person who was not a Black would probably have a more difficult time getting elected in that district than a Black person.

Q. Would that be a true statement as to Precinct 6 and Chicanos?

A. It is not that clear. An Anglo in Precinct 6 would have a good chance to win, a white in 7 would have a difficult time, but 6 is sort of a tossup between Anglo and Chicano, just on sheer percentages.

Q. Would it be a fair statement to say a majority of the Chicano population is included within Precinct 6?

A. Even that is difficult to say, I think it is safe to say Precinct 6 has a sizeable segment of Chicano, but when you think in terms of total percentage of Chicano population in Harris County, I doubt it is a majority, although I don't know.

[33]

Q. How did you in voting, make a determination that the office was vacant after your order was entered?

A. Okay, in redistricting the J.P. districts—positions one and two, our interpretation of the law, election law, meant that everybody would

[34]

run in 1974, but that the people who were elected in 1974, position two would not have to run for four years, but those in position one would have to run again in 1976 for a four year term, so in every instance we appointed an incumbent justice of the peace in position two,

in effect saying to him, if you are elected in 1974, you are the first one that gets a four year term, and the new guy will have to run again after that, and it was just a matter in a precinct where there was no incumbent—

Q. With reference to Precinct 7, my question is how did you and the Court make the determination a vacancy existed?

A. That a vacancy existed?

Q. Yes.

A. Because by redistricting, we created Precinct 7, a new Precinct 7, there were no incumbents living in that district.

Q. Okay, and you know this of your own knowledge?

A. Well, within fallibility, this is what we had determined, yes.

Q. Likewise, now, Precinct 7 which had formerly been in northwest Harris County, was moved generally to the southeast portion of the City

[35]

of Houston, is that correct?

A. The district was not, the number was. As a matter of fact, I had checked on this, I don't think you will find it was an informal question. I had a number of informal meetings with County Attorney Resweber and others, and one of the questions I asked, because I was concerned, if I created Precinct 7 in the southeast, is this de facto the same Precinct 7 that existed in the northwest, would a person who had been an incumbent in the northwest be moving into the southeast in the new Precinct 7, be an incumbent in 7. We were told no, in this instance there was a definite break in the two districts, this would not be the case, so as far as I was concerned and the Court was concerned, that was new district 7, period.

Q. All right, Precinct 6 was a new district?

A. Right.

Q. It is your opinion and your interpretation, based upon the advice you received?

A. Yes.

Q. That all of the new precincts as of July 1st—all the precincts as of July 1, 1973 were new?

A. Well, they were new, but the law said that even

[36]

with the new districts, that if an incumbent lived in there, he had the job, so they weren't so new in the sense we are going to be able to fill all the positions, because some of the positions were automatically filled with incumbents.

Q. That would have been in addition to relying on what Mr. Resweber stated, that would have been in conformity with—

A. He shall continue in office as justice of the peace and so on.

Q. I will find the right page. Article 2351½ (a)—(c), correct? (b) applies to commissioners?

A. Right.

Q. (a) applies to both, and (c) applies to residence when they have change of boundaries in justice of the peace precincts?

A. Right.

Q. So the authority you relied heavily upon and made your determination upon, Article (c) of 2351½, would that be correct?

[38]

Q. Was any consideration given by you as a member

of the Court to making the redistricting effective as of the next general election?

A. Yes.

Q. What has—why wasn't that done?

A. For several reasons. One, and this is something that is difficult to the average lay person to understand, but I think we are all aware of it. No matter when the effective date was made, somebody's terms had to be shortened, for the very simple reason constables and J.P.s run at different times and elected for four years, even if we made it effective at the general election, we would still have shortened somebody's term. The fact we couldn't have saved everybody's term for the length they were elected is really out the window once you decide to redistrict.

[39]

Secondly, I was in favor of the voters having some chance to evaluate the new officeholders, and the sooner the effective date was, the more time it was they would have, the more the voters in 1974 would be able to see whether that guy was good or wanted somebody else; but third, probably more important than either of these, once we made the decision redistricting was needed to provide regional services, community interests, whatever, once we decided this be done, doggone it, let's do it as soon as practical.

Q. Let me ask one question, I am not getting personal, but would you tell the record whether or not redistricting and the establishment of Precinct 7 as it now exists after the Court's order, was done as a promise to the Harris County Council of Organizations to create a J.P. in precincts where Blacks could be appointed and would conceivably be elected?

A. I am not sure what you mean by promise.

Q. Let me rephrase the question.

A. Certainly this discussion came up.

Q. Was this a commitment, without being binding, was this a pledge by you this would be part of

[40]

your consideration for, redistricting along the—

A. In the first place, I think my personal reactions to drawing of a Black or Brown district, my personal agreement with this as something needed in Harris County, I have always felt one of the best ways to improve race relations is give them a piece of the action.

Q. I am in agreement with that.

A. This is personal commitment on my part.

Q. Right.

[41]

Q. Was there any consideration given to other ethnic groups other than Black and Chicano?

A. Well, I am not sure they could consider themselves minority group, but it was generally understood

[42]

Q. And, let's see, the various Jewish population of the City of Houston, which is an ethnic minority, when you take ethnic groups as a whole but generally classed as Caucasians?

A. I know—and here is a judgment on my part, and I guess nobody for the Jewish community made a recommendation on this line, I guess— I know I considered

Jewish a religious rather than ethnic minority, but no consideration was given to a "Jewish" district.

Q. But prime consideration would have been to Caucasian, Black and Chicano or Mexican-American, would have been prime consideration in drafting? When I say that would have been consideration, as far as pertains to raise?

A. Okay.

Q. Is that correct?

A. As far as pertains to race, we only looked at three distinctions.

[44]

Q. Because under the law more than two existed?

A. Right.

Q. Judge Lee is in office by virtue—

A. Of reappointment, right.

Q. And I believe, could you state to the record whether or not any of the other three elected officials, Judge Zaboraski, Judge Mahan or Judge Doering were reappointed to the position two that was created in the same order?

A. No, my major decision there, this was just my feeling, I can't say for the rest of the Court, I wanted an attorney in this position, none of those three were attorneys.

Q. Judge Lee is not?

A. Judge Lee is an attorney.

Q. Is not an attorney.

A. I was told he was. He is not?

Mr. Gilleland: Off the record.

(At this time there was a brief discussion off the record, after which the deposition continues as follows:

A. He is not an attorney? All right, someone misled me, but that is not unusual.

Q. Likewise, that would have applied to the constable offices as well, Constable Bolton,

[46]

A. Let me get myself straight. You represent who?

Q. I represent Mr. Zaboroski.

A. Fine.

Q. You stated that there has been numerous reasons for redistricting. What would you consider to be the prime reason for bringing this about?

A. Well, I can only state for myself, because it took a majority of the Court to vote, so what I say might not apply at all to what somebody else felt about redistricting, this would be mine.

I served ten years in Austin, I had seen three redistrictings up there, I had seen what I consider the real disadvantages of the districts that were way off from one man, one vote, I was a real firm advocate of the Supreme Court's ruling when it came to one man, one vote. I have been very much aware of the inequities of the districts in Texas for a long time, and I saw the deviation from less than 7,000 to more than 1,000,000 in Harris County. I think this probably is as good a consideration as major, as important a consideration as

[47]

anything, realizing that that ties in directly with providing services for the citizens.

Q. As I understand your testimony, you say consideration of so-called safe districts for minorities was considered, was brought up in your considering these districts, is that right?

A. Well, it depends on—the term "safe", when you say a district of 62.5 percent Black, okay, I consider in all probability a Black will get elected or re-elected there. When you consider a district thirty-five to forty percent Chicano, I am not sure that is a safe district.

Q. But the reasoning that such a district, with minority representation being over a majority, such reasoning was considered by yourself?

A. As part of community interests and services to the community, you bet.

Q. I believe you might have touched on my next question. In what manner did such so-called safe districts play in your emergency services and community interests?

A. Well, we felt people in Sunnyside and Third Ward have a lot more in common and lot more similar problems and would be provided better service if they had facilities there than if they

[48]

had to come to the downtown courthouse or north Harris County or southwest Harris County, something like that, and therefore the district itself was—District 7 itself is designed in the sense of there will be two regional facilities in that section of the county, and that section of the county happens to be predominately Black.

Q. I believe you made the statement before that relationships could be improved if we give them a piece of the action, that type of reasoning?

A. Yes.

Q. This reasoning was applied in creating these districts?

A. Yes, that plus the fact when you go to redistricting, and you are going to draw eight districts, and you know that any statistics you look at, the Black community makes up roughly twenty-five percent of the population of the county, that you were leaving yourselves open to some potential future court action if you didn't take into consideration Black representation, because many, many cases have gone to the court and have been thrown out because minorities were not represented in redistricting plans that took place previously, so minorities was a consideration in redistricting, because we have seen cases where that was not a factor and they were thrown out.

Q. Now, understanding your reasoning here as far as minority representation and that theory, let me ask you how did you arrive at the boundaries described on Exhibit 2?

A. I am not being facetious, when you try to describe how redistricting boundaries are arirved at, there are innumerable factors, race was a factor, but so were all these other things we talked about, services to the community, population was a factor, natural boundaries, although it is hard to define natural boundaries, but they are part of the picture. For example, in Precinct 7, that particular district runs straight down Mykawa Road all the way, it is just a feeling that sort of marks the boundary between one community and another community. Well, I am not trying to dodge the question, it is a question difficult to answer, you have incumbents, you have people with political ambition, you have all kind of factors that go into drawing a line.

Q. Would it be safe to say race played a more dominant part than one man, one vote, really, in drawing these lines?

A. I don't think so, again I can't talk for anyone but myself. The main reason this plan was submitted rather than my complete going on with Bill Williams' Plan, the Bill Williams Plan did the same thing as far as creating minority districts is concerned, but it was way, way off on one man, one vote. If my major consideration had been minority consideration, I would have gone behind the Bill Williams Plan and pushed it as the committee plan, but since it was off one man, one vote, I took the unpopular stand of making another plan, muddying the water more, to get closer to one man, one vote. You will see District 7 is not a heck of a lot different under Williams than this one.

* * *

Q. Commissioner Bass, I believe you earlier stated you spent some ten years in Austin, that was as a member of the Legislature, was it not?

A. That's right.

Q. What was that period of time you served as a

member of the Legislature?

A. From January, 1963, to January 1973.

Q. And you were a representative in the House of Representatives?

A. That's right.

Q. During that time, did you not also state that the Legislature had attempted on three different occasions to

redistrict the state, both as to the representatives as well as to the senators?

A. Right. Well, three broad times, there were some minor redistricting, more than that where they changed a few lines, but major overhaul, three times.

Q. As a member of the Legislature yourself, you were involved in that redistricting?

A. That's right.

Q. Were you more involved, say, than the average member of the Legislature?

A. Yes.

Q. Where you might have been a member of the specific committee?

A. I was member the last time. I was twice a member of the Harris County delegation, was running, in effect, with the majority the Harris County delegation felt should be done as far as

[52]

redistricting was concerned.

Q. At various times, those particular redistricting attempts by the Legislature were contested in various courts?

A. Right. As a matter of fact, the one drawn the last time, over my violent opposition, publicly, privately, every way, was stricken by the courts as being unconstitutional.

Q. That was done by a Federal court, was it not?

A. Right.

Q. So, you had considerable experience, I take it, from your participation in those redistricting plans for the Legislature, with redistricting?

A. Oh, definitely, and with court decisions concerning redistricting, plus the fact my fulltime—I am a politician by accident, a teacher by profession, which profession is

teaching political science at the University of St. Thomas, I have been very involved in Supreme Court rulings on redistricting, particularly, starting with Baker vs. Carr.

Q. All right, sir, and are you presently teaching at the University of St. Thomas?

A. I presently teach an evening class in order to retain my tenure, so I have a job if I decide

[53]

not to run again or something.

Q. You teach political science?

A. Right.

Q. Do you hold a title there?

A. Yes, Chairman of the Department, and professor.

Q. How long have you been Chairman of the Department of Political Science?

A. Four years.

Q. When you came on board the Commissioners Court, you had this extensive background in redistricting, and you, I take it, were primarily interested, of course, in seeing that the county was districted properly, both as to Commissioners Court as well as justice of the peace and constable?

A. Right.

Q. Your answer is right?

A. Right.

Q. And I believe you stated that you became a member of the Commissioners Court January 1, 1973?

A. Right.

Q. And that you were appointed—

A. There were two steps—may I interrupt?

Q. Yes.

A. Two steps, first, Commissioners Court appointed me as liaison to look into the possibility of

[54]

redistricting.

Q. When was that, again?

A. That was the 12th of January.

Q. All right.

A. So, and then when I came back in to recommend after that—I have the date, I don't remember exactly when, I had a recommendation of a nine member committee, then Commissioners Court appointed that nine member committee.

Q. Is that the date you don't recall?

A. Yes, I have the letter here, but I just—12th of January, they appointed me liaison.

Q. For the specific purpose of looking into redistricting?

A. Right, and then—if I can find it here. Well, I don't have the date at my fingertips, but it would be later, the latter part of February.

Q. That was a short time after you were appointed liaison member of the Court for redistricting purposes?

A. Yes. At that point in time, the Court then appointed —here is the date of the 12th of March, that is when we were officially organized as a committee on order of the Court.

Q. On the 12th of January, you were appointed by

[55]

the Court to act as liaison for the purposes of looking into redistricting?

A. Right.

Q. On the 12th of March, 1973, the Court actually appointed this committee?

A. Right.

Q. That was a committee of some nine persons?

A. Right.

Q. I believe you were elected chairman by that committee?

A. No, I was appointed chairman by the Court.

Q. There were eight other persons members along with you on the committee?

A. Right.

Q. And in your study, both prior to the time of your appointment to the chairmanship of that committee and after the committee had been formed, were you able to determine the last time that Harris County had been definitively districted as far as justice of the peace and constables were concerned?

A. The nearest I can find on that is 1876, where they drew up the constitution, we didn't originally—

(At this time there was

[56]

a brief discussion off the record, after which the deposition continues as follows:

A. As far as I can tell, you can overlook something, but one hundred years ago, sometime in that time would be, but what research I have done, what research others presented to me, it has not been done since 1876.

Q. All right.

Mr. Landry: Mr. Gilleland. I believe for the record, we can stipulate 1876 was the last time it was redistricted?

Mr. Gilleland: Right.

Mr. Kerfoot: Yes.

Mr. Cox: I guess so.

Q. Now, prior to this redistricting on June 28, 1973, by Commissioners Court, how many precincts were there in the county?

A. There were eight justice of the peace and constable precincts. As you know, the law says there can be from four to eight precincts, so Harris County had eight.

Q. Among those eight precincts, how many justices of the peace were there actually in office prior to June 28, 1973?

[57]

A. Nine.

Q. And I take it there were two justices of the peace in one precinct, with one justice of the peace in the other seven?

A. Right.

Q. Which particular precinct had two?

A. Precinct 1, the precinct that had 1,000,000 plus people had two justices of the peace, all the rest had one.

Q. All right, now, after the redistricting, how many J.P.s were provided for by the Court with the new plan?

A. Sixteen provided for and fourteen offices were filled.

Q. All right. I take it the Court will at some time in the foreseeable future fill the other two?

A. The only delay for their selection is simply getting housing facilities for the ones we have now, and then we will fill the other two.

Q. And under the law, of course, one constable is required and authorized for each of the precincts.

A. That's right, and only one.

[59]

Q. And I believe the Commissioners Court has recently, in connection with redistricting, redistricted the county as to county commissioner precincts?

A. That is correct.

Q. And did you all apply the one man, one vote concept with regard to that body?

A. Quite definitely. The deviation now is less than one-half of one percent between the smallest and largest commissioners precincts, as of 1970 census figures, which are the latest figures we have.

Q. When did the Court redistrict the county with regard to commissioners precincts?

A. I think that was probably two or three weeks prior, two weeks prior to this J.P. one, it

[60]

was all part of the same study, but I think the vote was two weeks earlier.

[62]

Q. After the committee was formed on March 12th of 1973, how many times would you say, or can you recall, that the committee met to consider redistricting of the J.P. and constable precinct?

A. Given time ahead, I could look it up in detail, I will give you a rough answer. I know we held three public hearings. By public, in the Jury Assembly Room, everybody invited.

Q. Let me ask you by public hearings, was any notice given?

A. Yes.

Q. By way of newspapers, that sort of thing?

A. Right.

Q. Did you publish the fact?

A. We did not publish in the sense of buying a paid ad, but published in the sense I issued a news release prior to each meeting, and the news media carried it.

Q. In addition to those three public meetings, did you all have other meetings?

A. Yes. These other meetings, I don't mean to imply

[63]

not public, but not publicized in the same sense as the other three hearings. We had at least three hearings in the open, Commissioners Court, in which anybody could come, but not publicized to the same extent as the three in the Jury Assembly Room.

Q. Did various members of the public attend those?

A. The ones here yes, but not the same extent as the ones publicized.

Q. Were those extensive meetings?

A. Yes.

Q. That is lengthy, annd was there considerable discussion held?

A. Oh, yes.

Q. Did members of the public participate in these?

A. Definitely. As a matter of fact, it was of sufficient numbers and intensity that the constable involved and Sheriff's Department felt it might be good to have some people around.

Q. For law enforcement purposes?

A. Right.

Q. And during the time that the committee was meeting, were there—was this topic of redistricting of the J.P.s and constables discussed in the various Commissioners Court meetings along

[64]

about that same time, did the topic come up?

A. The topic didn't come up on the official agenda

until about, I guess, three weeks before we adopted it, as I recall, I might not be quite accurate. I submitted all the proposals one week, the next week we voted on Commissioners Court, then two weeks later, on J.P.s and constables, which would mean three weeks. During that time it was discussed in open court, but obviously, eating lunch, passing in the hall, various Commissioners chit-chatted about this thing.

Q. During this time, was there not considerable publicity being given to these redistricting plans?

A. Definitely.

Q. In the various newspapers?

A. We made the front pages of both papers.

Q. Houston papers?

A. Right, Houston Post and Houston Chronicle.

[65]

Q. Now, in your opinion, from your study of the

[66]

various plans, was the Williams Plan among the committee plans, the only plan which could be considered to have had an ethnic group, as such, either Black or Brown?

A. Not at all.

Q. Carved out as precincts?

A. Not at all.

Q. How many of the others would you say would have had Brown or Black precincts, as such?

A. If I am not mistaken, I may be off a little bit, but not much, every plan, with the exception of the existing boundaries, every plan submitted, every plan had what you call minority precincts, including Constable Moore's plan.

Q. That would be by minorities, you mean Black and/or Brown precincts?

A. Right.

Q. Would it have been difficult or would it have been an easy task to draw up a plan which would not have had either a Black and/or a Brown precinct?

A. Well, we could have kept the same districting there, and those did not have a Black or Brown, but once you get beyond one district that has one million citizens, you start getting the

[67]

districts anywhere near equal, it will be pretty difficult I would say to have one that does not have a preponderance of one or the other minorities.

* * *

Q. Is it not true you earlier testified consideration

[68]

also was to making the representation of the people in the various J.P. and constable offices more reflective of the people by making it possible for not only whites, but for Blacks and Browns and women?

A. Yes.

Q. To be holders of those various offices?

A. Right, yes, that is true. Of course, another point that has not been mentioned, again one among many, I am really concerned and in complete agreement with the Bar's opinion that the J.P.s ought to be attorneys, and another emphasis in filling new positions was to get qualified, bone-fide attorneys into J.P. positions, to make it a position of prestige, if at all possible.

Q. All right, sir. I believe you also stated that the Court either has or plans to have court facilities in the number of some sixteen throughout the county?

A. Yes, we are specifically requesting that the J.P.s, the two J.P.s in a single district, do not initially—well, hopefully never, but do not initially have the same court facilities, we want them in separate court facilities.

[74]

Q. With regard to the redistricting plan, I take it the Court was primarily concerned with satisfying the requirements of Section (3) of Article 2351½ in regard to J.P.s and constables, is that not right?

A. This is in the filling of the vacancies, all that has to do is filling vacancies. If it is redistricting, that doesn't relate to redistricting. I don't know what your question is.

Q. I think that answers it. Under Article 2351½, you all tried to comply with those requirements regarding filling of vacancies?

A. Right.

Q. I take it under 2351½, the redistricting as adopted by the Court required filling of vacancies as they occurred by reason of the redistricting with incumbents on a residential basis?

A. Right.

[76]

Q. All right, sir, so the Court then fully complied with the requirements of Article 2351½?

A. Certainly; as far as I can tell, we did.

Q. To summarize your testimony with regard to the reasoning and reasons which the Court relied on in the redistricting plan as now in effect I believe you stated

one, and you described it as a real important consideration as far as you yourself was concerned, was drawing of boundaries on census tracts?

A. Yes.

[77]

Q. All right, then, another consideration was to make the various precincts more equal in population than they were under the old existing plan?

A. Right.

Q. Under the old existing plan, there was a variation from 7,000 to 1,000,000?

A. Less than 7,000 to more than 1,000,000, right.

Q. What is the greatest disparity now?

A. From approximately 145,000 to 345,000, about 200,000 variance.

Q. Another consideration was in your words, to give minorities a piece of the action?

A. That was another consideration.

Q. And the Court did, in fact, pursuant to that appoint a Black J.P. and Black constable, did

[78]

it not?

A. That's right.

Q. In the predominately Black precinct?

A. Right.

Q. Which precinct number is that?

A. 7.

Q. And did the Court also appoint a Mexican-American J.P. and a Mexican-American constable?

A. Right.

Q. In the predominately Mexican-American precinct?

A. Yes.

Q. What precinct number is that?

A. 6. As a matter of fact, two Chicanos there, two Chicano J.P.s and one Chicano constable.

Q. All right, sir, and another consideration, I believe you stated, was to provide regional services?

A. Right.

[79]

One other thing, we did appoint—it has nothing to do with it, but we did appoint a woman to J.P., again apparently for the first time in the history of the county. There were two women, the second woman's name I won't mention, she declined for personal reasons, I talked to about filling vacancies, one declined, but as far as I was concerned, there would be two women appointed but one declined.

Q. As far as you know, is this not the first time a Black or Mexican-American has been appointed as constable or J.P. in Harris County?

A. As far as I know.

Q. Would it be your opinion in both of these two

[80]

precincts, 6 and 7, that in the respective precincts as represented by a Black J.P. and Brown J.P., as well as the Black constable and Brown constable, that the people in those areas would be better served, law-enforcement-wise, by people with their own district predominance?

A. This is a personal thing on my part, a lot of people disagree, but I feel it is a better situation than previously existed.

DEPOSITION TESTIMONY OF COUNTY JUDGE BILL ELLIOTT

[6]

Q. Perhaps the question was a little unfair. Let me put it this way. Had you personally, along with Commissioner Bray, ever had any personal meetings or conversations with Mr. Bass prior to his becoming a member of the Commissioners Court concerning the desire to change these Justice boundaries and Constable boundaries as they were ultimately done?

A. Yes.

Q. Approximately when did these first conversations take place?

A. Probably sometime during his campaign, back in the early

[7]

Q. All right. And have you had an opportunity to read Commissioner Bass' deposition under oath?

A. Yes, I have.

Q. Okay. Then I can refer to it. I don't have a copy of it. If I ask a question and you want to rely back on it, if you have a copy with you, certainly we can take the time to do it. I don't think there will be that much, but I want to be fair, because I am asking about somebody else's statements outside their presence.

Commissioner Bass, as I read his deposition—and I will state I read it quickly, yesterday evening I received my copy—stated that one of the purposes, although not the only purpose, of the ultimate plan as approved by the Commissioners Court which resulted in the new boundary lines as they are now constituted was to see that, as he put it, there were safe precincts, both Constables and

Justices, for both Black and Mexican Americans. In other words, racial and ethnical minorities.

Mr. Landry: Subject, now, to what the deposition actually reflects with regard to Commissioner Bass, I have

[8]

no objection to what you represent Commissioner Bass having said in his deposition.

* * *

A. The makeup of the county, I think, is such that to redraw Justice of the Peace precinct lines, Justice of the Peace and Constable lines, would be that a somewhat safe precinct—when you consider the community interest and the nature of the Black segment of Harris County, it would be difficult to not draw precinct lines in this regard. It would be almost a matter of gerrymandering to prevent such an act.

[9]

part of the political facts of life in our area.

Now, my question is, then, I think perhaps more fairly, would be directed to you, Judge Elliott, and that is as you discussed personally with Commissioner Bray and Commissioner Bass the proposed idea of creating these new Justice and Constable precincts, was this in fact a primary consideration given so that when the ultimate lines would be drawn, as they now have been, that there would be two or three areas where the safe so-called political havens would be for persons of Black and/or Mexican-Americans, or other ethnic minorities to be elected to these positions?

A. That is a very general question, but—

Q. Let me break it down.

A. No. I just say yes, in the general context. I would question the use of "as a primary factor." There were many factors.

* * *

Q. What were the factors that you discussed with Commissioner Bass that were a predicate, or the basis for, in fact, the decision to redraft along the lines ultimately finalized?

A. I think—not in the order that I will state them, but as a result of action taken by the legislature the

[10]

Justice of the Peace and Constables had gotten their salary raised and then legislation causing the county to pay a salary to those that were elected by three or four hundred people the same as those that were being elected by three or four hundred thousand. The discrepancy in the size of the districts populationwise is certainly one of the major factors. The size, the location of the precincts, even the matter of availability to the Justice of the Peace and Constables offices. The fact that we did want to increase the number of offices, which is really maybe the primary factor, to provide subcourthouse facilities through Harris County.

* * *

Q. All right. And based on—and I can only base this on what I have been advised, what I have read, members of the Court have been quoted as saying in the news media and talking to the reporters who interviewed them, that there was little or no question that one also very primary purpose was to assure these safe districts would be created.

A. This was a factor.

[11]

Q. I have no recollection of any.

Now, in that regard, was any discussion ever had concerning the drafting of these districts what effect the change of the district that Mr. Zaboroski was in, the old District 6, would have on the Republican voters, with the growing number of Republicans living in that area, with whether or not they would have the opportunity to, likely, elect another Republican Justice in the newly created district? Was that considered at all?

A. I would imagine there was some conversation along this line. I think it is fairly evident from the lines of Precinct 5 that this seems to be a safe Republican area; may or may not be.

[12]

that could very well—which would be another area that could go Republican.

Q. As far as I know, and I ask if your recollection is consistent with mine, this Precinct, old 6, was the only one that ever actually sent a Republican to the office of Justice of the Peace in recent history?

A. I think that is correct.

[13]

Q. All right. Would you let me have the names of any of the persons appointed who were proposed to the Court by Commissioners Eckels or Commissioner Lyons?

A. I think Commissioner Eckels and Commissioner Lyons had a recommendation in regard to at least one, but I question whether or not I am at liberty to disclose that discussion

[15]

Q. I think we can leave that area.

Now, one of the apparent factors given by other members of the Court, at least as I understand it, was that it was a desire based on this disparity of salary increase in an attempt to upgrade the position of Justice of the Peace, one of the factors that the Court considered, at least Commissioner Bass said he considered, was the fact it would be desirable to have a lawyer sit in the positions. And my question to you would be: Was that in fact a substantial reason or basis in part for this redistricting, in order to assure lawyers to accede to the position of Justice by appointment, rather than non-lawyers?

A. Again, this was a factor. It goes back. But the primary factor was the establishing of the subcourthouses. But it naturally followed that I have been a personal advocate of lawyers being judges. In two or three of my campaigns

[16]

this has been an issue.

[18]

Q. In other words, the responsibility for and the ultimate selection of these committee members was done by Commissioner Bass?

A. That is correct.

* * *

Q. All right. Now, let me ask you a couple of political questions. I am asking you this as an office holder of many years. Commissioner Bass in his commissioner precinct was primarily supported by, of course, a liberal voting majority, isn't that true, composed of in large part Black, Mexican-Americans and Union voters?

A. In his wing of the election?

[19]

Q. Yes.

A. His record is such that this is the usual area that he gets major support from.

Q. Right. Justice Republican would seek the conservative on the other side.

A. There are a number of conservatives that support Commissioner Bass.

Q. I am sure that is true. I know a number of them support you, also.

A. Yes.

Q. But I was asking for the general political complexion of that particular commissioner. And I would ask the same question as to Commissioner Bray. His general political support primarily come—by that I mean where he has to really look for election to a strong voter turn out—in these three general voting blocks, the Black, Mexican-American and the Union voter?

A. This is generally the makeup of Precinct 2 more so than it is of Precinct 1.

[20]

A. Okay. Now, to get into this area a little bit more, as I understand—and again, I am predicating this as I understand. I have not interrogated Commissioner Bass nor did I have a chance to take his deposition because I entered the case later. I understand that the records from our investigation—this will be subject to challenge, because the records will speak for themselves—indicate that a substantial portion of the Black precincts and the precincts identifiable from a voter standpoint as Mexican-American and certainly the voter precincts identified as Union delivered substantial majorities for all three members of the Court, yourself, Commissioner Bray and Com-

missioner Bass in your last elections, with few, if any, exceptions? That is a general question.

A. That would not be a correct statement.

Q. All right. Not generally correct?

A. It is correct as to Commissioners Bass and myself, but it is not correct, I believe the record will show, in regard to Commissioner Bray.

[21]

Q. So this redistricting would certainly do, as you said a politician must do, shore up and broaden his base, to say the least, wouldn't it?

* * *

Now, there was no serious consideration given, of course, to appointing a Republican to any one of these positions, was it, by the Court, as far as you yourself know?

A. Yes, there was.

Q. All right. What was the primary factor which caused the Court to decline to do this? I am not asking for any confidential conversations or personalities, but the basic reasons.

A. They just were not selected.

Q. All right. It wasn't a question of fitness? There were certainly plenty qualified Republicans that would have fit the bill as much as a non-lawyer would have fit the bill for a J.P., wasn't it?

A. There was.

Q. Would you concede it was not a fitness question?

[22]

Q. I don't mean to imply everybody sat down and said, "Let's sap these Republican's." I doubt very seriously

that would occur. I am just saying the subject of the decision was not there had to be a reason not to appoint a Republican, since we were spreading out the patronage in this case—and this is what you call new appointees or not elected by the people—we were spreading out the patronage, or taking care of groups and my group wasn't taken care of and I would like to know the reason. That question is posed on behalf of Republican deposed Justice of the Peace Zaboroski.

A. Very serious consideration was given to the appointment of Judge Zaboroski. And I feel confident that if he had been a lawyer that he would have been reappointed.

Q. Well, he was actually in truth replaced by Judge Albert Lee, wasn't he, a non-lawyer?

[23]

A. Yes.

Q. Which is really kind of contrary to your basic publicly stated posture. Right?

A. That is correct.

Q. Now, the Statute, I understand, provided part of the reason for that particular circumstance, the way the lines were drawn Lee happened to fall within the newly created Justice precinct and since there were not two there was not a vacancy and so he actually acceded to a position he had not been elected to by the basis of the peculiar Texas Statute. Is that correct?

A. Yes.

Q. And it was possible for the commissioners as they sat down in their wisdom to change these boundaries in any particular manner they so desired in order to achieve any purpose they wanted to achieve?

A. That is correct.

Q. Also had the right to have appointed Judge Zaboroski rather than Judge Lee in that particu r instance?

A. Right.

Q. Had there really been a serious desire, for instance, in one thing, to locate—excluding creating safe districts—regional courthouses—in other words, a primary consideration wasn't first to place nine, eight, seven or six regional courthouses just geographically then draw the

[24]

lines to conform, but in truth and in fact it drew the precinct lines and then with the idea, "We will later come on and determine the location of the courthouses." Isn't that true?

A. Yes, I think that is correct.

Q. All right. Now, one other area that bothered me in the case, in reading the deposition—I am trying not to recover much of what was gone into in Eckels' deposition—one area that bothered me was who made the basic recommendation on the Commissioners Court to have this change take effect immediately, as opposed to the next general election so that the voters would not be disfranchised immediately after having just elected people in office in a general election?

A. I think it was the consensus of the majority to move forward.

Q. All right. These things don't happen by osmosis; somebody has to say—somebody negotiates that. Who was the majority of three that made the plan or suggested that we do it now, and then I want the reasons for it, but let's first find out who made the suggestion?

A. I think this probably was Commissioner Bass, because he was the liaison—he had conducted the various committee meetings and—

Q. He was primarily running this section of the thing while

[25]

the Court was doing many other things. Is that correct?

A. That is correct.

Q. Okay. Now, what in your judgment justifies doing these appointments now, as a member of the majority, as opposed to creating these districts and leaving them as they are until the next general election and allowing the voters to select those people who would sit in judgment of them as Judge or handle their security matters as Constables as had been done in the Commissioners change just previously?

A. Well, this was different. I think this was a more fair way of doing it than what we did in the commissioners redistricting five years ago. At that time we moved an entire commissioner's precinct from the north to the west because one of the commissioners was going to retire, and this then allowed approximately one-fourth, almost one-fourth of the voters at that time not to have the opportunity to vote on a commissioner. I thought that was very unfair at that particular time.

This time I think the feeling was that there were some legal problems—I believe in regard to a case in San Antonio—whether or not if precinct changes were made that Justice of the Peace present office holders would move from one place to another and establish residence. That plus another factor being that by these

[26]

appointments the people this next election would have the opportunity to look at the individuals that had been appointed that were the office holders and to then have an opportunity to make a selection of their own.

Q. Well, they normally have this at every open election, anyhow, don't they?

A. Yes. But for Justices of the Peace who remained in office going from a 6,000 population precinct to a 150,000 population precinct the additional people there would not have had any opportunity of voicing selection in regard to that particular individual any more so than if we had appointed him.

[27]

Q. Judge Elliott, I believe you testified as to the factors which underlay the Court's decision to redistrict at the time that it did. One of the factors being the disparity in population. There was considerable disparity between the existing JP precincts as they existed prior to the redistricting, was there not?

A. That is correct.

Q. And in addition to that factor, and I suppose this would have to do with the disparity as a result of the legislature having upgraded salaries for JP's and Constables, and it was patently unfair to be paying one JP or Constable the same salary as another JP where the first JP or Constable was elected by three or four hundred voters in a precinct of a few thousand compared to another JP or Constable in another precinct with three or four thousand people?

A. That is correct.

[28]

Q. In addition to those two factors, I believe you stated one additional factor was the desirability of the Court to place lawyers in the various Justice of the Peace positions?

A. That is correct.

Q. All right. And I think you also stated that among those factors and other factors the Court did give consideration to the formation of minority precincts; that is, consideration was given for the purpose of having minority representation in county government?

A. That is correct.

Q. And I will also ask you if the Court considered the redistricting on the basis of the Federal Census Tracts?

A. Yes.

Q. All right. Can you just offhand recall any other factors which the Court gave consideration to for the redistricting which ocurred on June 28, 1973?

A. That would be the factor of the subcourthouses and the providing of services within the area, making these services more available. This is, I think, a philosophy of the majority of the Court, and we hope to have the various county functions in these subcourthouses.

Q. All right. These have generally been referred to in the press as regional facilities. Is that not right?

[29]

A. That is correct.

DEPOSITION TESTIMONY OF COUNTY COMMISSIONER JAMIE H. BRAY

[73]

Q. Now then my question would be: Whether or not there was consideration on your part in casting your vote for changing the boundaries of the JP's and Constables, was there a consideration by you given to the one man-one vote principles?

A. I think this was the first plan that we started out talking about, was maybe one man-one vote. And I think someone had proposed a plan close to that at one time. But in looking at it, we looked at the number of papers served, the best we could, and frankly here is something else that we are attacking, is an adequate record keeping system. Hopefully we'll

[74]

have this on computers in the next couple of years: How many papers are served and what's handled and so forth.

So, in taking the best records we could find of the activities in the county, and the potentiality of it, this is how we arrived in laying these precincts out this way.

And I think everyone of us will tell you that none of us are saying this is a perfect plan. It's the best we knew how to come up with to serve the Harris County people best.

Q. Now looking at the same copy of the exhibit, which you have before you there, it's really apparent that the one man-one vote principle was not applied.

A. No, sir, it was not.

Q. Even though it's much less in disparity of population than it was before?

A. Yeah, I would say so. When you jump from six thousand to a million and then come over here to a hundred forty six thousand to three hundred thousand.

Q. That was one issue we had raised. This is up to the Court, Commissioner, to determine whether or not when you have a voluntary redistricting, the one man-one vote rule applies.

Now the Court has never ruled on this matter. Now

[75]

keep in mind that we are talking about one mandatory, where they say, "You have got to" and the other undertaking, where we're challenging, is where you don't have to, but by virtue of some constitutional provision or state statute you voluntarily undertake it, as y'all did. You didn't have to redistrict the JP precincts. But the Commissioners Court voluntarily undertook that, regardless of what the motives may have been.

And, so, we're asking the Court that where you have the authority to undertake this voluntarily, by virtue of a state statute, then is it mandatory that the one man-one vote rule apply?

A. John, you know the encouraging thing about this whole situation, and certainly I don't want to see the County expending funds or your clients expending funds unnecessarily, but the encouraging part about this whole thing, is that we have raised some pertinent issues of how we can serve the public best.

Q. Correct.

A. And I am willing to accept whatever the Court rules. But the big part that really chaps your rear end is to have someone come in and tell you that you did it for political purposes. And I can assure you that this was

not the intent of setting this thing up, any more than we are moving computers around for political

[76]

purposes. We are just doing it, trying to get the most mileage and serving the people the best.

And first of all, I say again, that maybe instead of ten years, maybe we ought to look at this thing again in another three or four years, in an urban area, and I would be perfectly happy to accept the wisdom of the legislature or a court that lays out a plan that says, "This is the way, in our wisdom, that you should do it." I would follow it to a "T." And I wouldn't have any qualms about doing it.

The sad part about it is that a bunch of people set here a hundred years and not do anything at all and just let the public suffer.

Q. Let me ask you this: Using the standards that apply in Article 5, Section 18, I may be incorrect on the direct quotation on that section, but I believe that it states, "From time to time, for the convenience of the people, the Commissioners Court has the authority to look at the boundaries of the various JP and Constable precincts." Let's just talk about them, the JP precincts, because they are harmonious with the Constables, so to speak, because you can't have one without the other.

A. Right.

Q. Calling it JP precincts, but from time to time the

[77]

Commissioners Court, for the convenience of the people, can redistrict these precincts. Now it doesn't elaborate what requirements must be met, if any. I think there is

some case log decisions. Of course, we are challenging those. But now would you say that your primary consideration was convenience of the people or what's best for the people in your judgment? Was that the criterion that you used in casting your ballot?

A. That was my total criteria for supporting any plan and redistricting. Here again you must remember this, too, that a JP's duties are so close to the people out there, on everything from a family squabble across the fence to who picked up Johnny's bicycle. And this again is the reason that I feel that the importance of this office, that many disputes can be settled out there by some knowledgeable and well qualified JP.

And frankly, I wouldn't be opposed to having more JP's maybe than two per precinct in an urban area, if you could bring them closer to the people. And at the same time if justice is not dealt with or handled properly by that individual, he is still close enough to the people out there that they can vote him out of office if they are being mishandled by him. And I like this part of it.

[78]

And for me to sit here and tell you that I have all the answers for updating county government, and that everything we have done is just the finest thing since Motherhood, I am not going to do it.

But I can tell you again, and I want it for the record specifically, that no one in our group, that voted for this plan, did I hear say, "Let's do this because it will be politically expedient for an election or for us" or what have you. I can assure you I wouldn't have supported it if it had been along those lines. And it was just trying to start off with some system to upgrade the present system. And that was the total intent, to the best of my knowledge.

[80]

Q. 6, 7 & 5. Now then that area, about which I am asking my question, to your knowledge is an unincorporated area of the City of Houston. Would that be a fair statement?

A. I would take your word for it.

Q. Let's exclude the City of Tomball and the City of Katy?

A. All right.

Q. That area is largely unincorporated?

A. But here again, though, John, you are undoubtedly missing the point I tried to get over to you. In that total area, you talked about, there is just—there is only twenty seven thousand people totally that reside out of that, out of a million seven hundred fifty thousand. You follow me?

Q. But I am trying to relate distance to convenience. That's going to be my next question.

A. But distance for how many people, though. You are going to make it more convenient for three hundred thousand than you are for twenty three thousand?

[81]

This is a difficult thing. I am not saying that those twenty seven thousand shouldn't be served, you know, as convenient as possible, because I do want them to be. But here again, another thing, the attorney that was questioning before said that I wasn't answering him directly. But another thing we are looking at, sincerely looking at, is a regional concept of government. Not only can they go to a courthouse annex or multipurpose center for J.P.'s and Constables, but go there and pay their taxes and purchase

license plates and buy marriage licenses and so forth. And the total concept is to bring the county government from the courthouse complex to the court out to the people. And we feel that in looking at figures of fees collected and fines and what have you, that on a strictly business basis of handling the taxpayers money properly, this should be done.

[82]

Justice precincts, which we now have the maximum, I believe—

A. Right.

Q. —in Harris County. Now the applying of those three criteria, approximately sixteen hundred square miles —

A. Seventeen hundred and something.

Q. Okay.

A. Seventeen plus.

Q. It's 565 times 3.

A. I'll stand corrected then if that's it.

Q. Well, let's just use seventeen hundred even.

A. Okay.

Q. Okay, sir. But whatever the square mileage is, knowing your number of census tracts that you have, there is no reason why a figure of population and square mileage could not be reached so it would be seven within every precinct, to your knowledge? Do you know of any reason?

A. The only thing about that that would be a good reason would be the precinct you just mentioned, 5, 6 and 7, has a large—I don't know what the square mileage is, but it's—I'd say more than a third. Far more than a

third, but you only had twenty seven thousand people totally out there.

[84]

Q. I am not questioning your motives, Commissioner. So I don't want to offend you, but I want to ask a question. If Commissioner Bass stated that it was one of the considerations in voting for the redistricting of the J.P.'s and Constables to give the blacks a piece of the action, would you tell, for the purposes of the record, was that one of your motives in voting for it?

A. Well, you know this sounds like Commissioner Bass, you know, shooting from the hip with some of his statements at times. But certainly, as I said earlier, I certainly do want to consider the blacks and the Chicanos. But at the same time I want to consider the good people out in Crosby-Highlands area, when we put a second J.P. And I am not opposed to everyone having some input into it. And I'll say this: Prior to this re-

[85]

districting, the black and Chicano population of this county probably didn't have a lot to say about electing a J.P. Very few.

Q. You are not aware of any requirement of the law, are you, that says that because of a person's race he is entitled to be guaranteed a political office?

A. No, sir. And you know, John, I said earlier, and I really think it's happening across this country, when you see again the Mayor of Los Angeles, California elected where there is only fifteen percent blacks—

Q. I am in agreement with you.

A. It's changing. And for anybody to come along and tell me that Precinct 6 or Precinct 7 is a sure fire Chicano or a sure fire black, they may be more politically astute than I am, but I think it's a pipe dream. I think that day, in the urban area, is gone.

[86]

A. John, my first criteria, and this is positive proof of who is out there, my first criteria in making appointments in those areas you are talking about is did they have the credentials and then what are those. That was a law degree.

And Judge Azios and Judge Rodriguez and Judge Peavy, the court saw fit to appoint, were all attorneys.

[87]

It wasn't because he had a black face or a brown face. We were looking at the credentials the guy was carrying. So that in itself should have showed what the true motives or redistricting was.

[78]

ORDER

(Filed January 30, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI; and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precinct Nos. 5, 6, and 7 of Harris County, Texas

V.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

CIVIL ACTION NO. 73-H-993

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District

Judge, and the issues having been duly heard and decision having been duly rendered.

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S.C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

THOMAS G. GEE
Thomas G. Gee
Circuit Judge

JOHN V. SINGLETON, JR.
John V. Singleton, Jr.
District Judge

CARL J. BUE, JR.
Carl J. Bue, Jr.
District Judge

[80]

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD E. MOORE, ET AL,
v.
HARRIS COUNTY COMMISSIONERS COURT, ET AL

No. 73-H-993

BLACKIE NEELEY
v.
HARRIS COUNTY COMMISSIONERS COURT, ET AL

No. 73-H-1033

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges.

GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of

1. Tex. Const. Art. 5, §18.

precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and stat-

utory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices. These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statwide effect and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote for and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrelevant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S. ____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous

---

3. See *Mancuso v. Taft,* 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

section pertaining to county commissioners, Art. 2351½(b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

THOMAS GIBBS GEE
United States Circuit Judge

JOHN V. SINGLETON, JR.
United States District Judge

CARL O. BUE, JR.
United States District Judge

SUPREME COURT, U. S.
73 - 1475
APR 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. A-742

HARRIS COUNTY COMMISSIONERS COURT, et. al.,
Appellants

v.

RICHARD E. MOORE, et al., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

JURISDICTIONAL STATEMENT

Date: April 5, 1974

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

MICHAEL R. DAVIS
Assistant County Attorney

202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151

Attorneys for Appellants

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX
and
TABLE OF CITATIONS

	Page
Order and Opinion Below	2
Jurisdiction	2
Question Presented	3
State Constitutional and Statutory Provisions Involved	3
Statement	3
The Questions are Substantial	8
A. The equal protection guarantee of the Fourteenth Amendment was in no way violated by the vacating of the offices in question, since such offices are local offices created for purely state purposes and their creation, rearrangement or abolishment for compelling state reasons relate solely to the internal administration of the state's political structure	8
(1) History of the Texas Law	11
(2) Compelling State Interests Were Indeed Served By The Redistricting and Article 2351½(c)	16
B. The District Court should have abstained from deciding this cause to afford the Texas courts the opportunity to determine the question of whether or not residency within the county, as distinguished from residency within a precinct, is required under the state constitution, the resolution of which in favor of Appellees would render unnecessary a federal constitutional decision	23
Conclusion	29
Certificate of Service	29
Appendix	33

TABLE OF CITATIONS

CASES

	Page
Ahern v. Murphy, 457 F.2d 363	19
Avery v. Midland County, Texas, 390 U.S. 474	3
Brown v. Meeks, 96 S.W.2d 839 (Tex. Civ. App. 1936, err. dism.)	14

CASES

	Page
Carr v. Brazoria County, Texas, 341 F. Supp. 155, aff'd 468 Fed.2d 950	23, 26
Childress County v. Sachse, 310 S.W.2d 414 (Tex. Civ. App. 1958, err. ref. n.r.e. 312 S.W.2d 280)	20
Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (Mich. Sup. Ct. 1971, appeal dism. 405 U.S. 950)	19
Gomillion v. Lightfoot, 364 U.S. 339	11
Hadnot v. Amos, 320 F. Supp. 107, aff'd 401 U.S 968	17
Harris v. Samuels, 440 F.2d 748, cert. den. 404 U.S. 832	26
Hastings v. Townsend, 136 S.W. 1143 (Tex. Civ. App. 1911, no writ hist.)	14
Higginbotham v. City of Baton Rouge, La., 306 U.S. 535	8, 10
McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ hist.)	27
Meredith v. Sharp, 256 S.W.2d 870 (Tex. Civ. App. 1953, err. ref., n.r.e.)	14
Pate v. El Paso County, Texas, 324 F. Supp. 935, aff'd 400 U.S. 806	21, 22
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496	28
Robinson v. Zapata County, Texas, 350 Fed. Supp. 1193	23, 26
Romero v. Coldwell, 455 F.2d 1163	25
Sailors v. Board of Education of County of Kent, 387 U.S. 105	3, 11
Snowden v. Hughes, 321 U.S. 1	8, 10
Spielman Motor Sales Co. v. Dodge, 295 U.S. 89	3
State ex rel. Dowlen v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897, err. ref. by Tex. Sup. Ct. 43 S.W. 1101)	12, 13
Taylor v. Beckham, 178 U.S. 548	8, 10
Telles v. Samples, 500 S.W.2d 677 (Tex. Civ. App. 1973, writ hist. unreported)	27
Turner v. Allen, 254 S.W. 630 (Tex. Civ. App. 1923, err. dism.)	14
Turner v. Fouche, 396 U.S. 346	3
Villanueva v. Harville, 419 S.W.2d 711 (Tex. Civ. App. 1967, no writ hist.)	27
Villareal v. Bustamente, 480 S.W.2d 231 (Tex. Civ. App. 1972, no writ hist.)	20
Villareal v. Brooks County, 470 S.W.2d 60 (Tex. Civ. App. 1971, no writ hist.)	23
Ward v. Bond, 10 S.W.2d 590 (Tex. Civ. App. 1930, no writ hist.)	14
Whitmarsh v. Buckley, 324 S.W.2d 298 (Tex. Civ. App. 1959, no writ hist.)	17, 20
Williams v. Castleman, 247 S.W. 263 (Tex. Sup. Ct. 1922)	13

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS AND MISCELLANEOUS

28 U.S.C.A. 134 19
28 U.S.C.A. 561 19
28 U.S.C.A. 1343 2
28 U.S.C.A. 2201 2
28 U.S.C.A. 2281 2
42 U.S.C.A. 1983 2
42 U.S.C.A. 1985(3) 2
Article 5, Section 8, Vern. Ann. Tex. Const. 7
Article 5, Section 18, Vern. Ann. Tex. Const. 9
Article 5, Section 24, Vern. Ann. Tex. Const. 24
Article 16, Section 14, Vern. Ann. Tex. Const. 24
Article 16, Section 65, Vern. Ann. Tex. Const. 21
Article 2351½, Vern. Ann. Tex. Civ. Stat. 6
Article 2355, Vern. Ann. Tex. Civ. Stat. 7
Article 2385, Vern. Ann. Tex. Civ. Stat. 19
Article 2460a, Vern. Ann. Tex. Civ. Stat. 19
Article 1.05, Vern. Ann. Tex. Election Code 6, 9
Article 4.11, Vern. Ann. Tex. Code of Crim. Proc. 19
Article 4.13, Vern. Ann. Tex. Code of Crim. Proc. 19
Article 15.01, Vern. Ann. Tex. Code of Crim. Proc. 19
Article 16.01, Vern. Ann. Tex. Code of Crim. Proc. 19
Tex. Atty. Gen. Op. No. WW-1251 (1962) 14
Tex. Atty. Gen. Op. No. M-68 (1967) 15
Tex. Atty. Gen. Op. No. H-220 (1974) 26

IN THE

Supreme Court of the United States

October Term, 1973

No. A-742

HARRIS COUNTY COMMISSIONERS COURT, et. al.,
Appellants

v.

RICHARD E. MOORE, et al., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

---

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a Three-Judge United States District Court for the Southern District of Texas, Houston Division, entered on January 30, 1974, declaring the Texas Statute, Article 2351½, Vernon's Annotated Texas Civil Statutes, to be facially unconstitutional, and permanently enjoining an order passed June 28, 1973, by the Harris County Commissioners Court which redistricted the County's eight justice of the peace and constable precincts.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

ORDER AND OPINION BELOW

A copy of the judgment Order, issued January 30, 1974, of the District Court for the Southern District of Texas, Houston Division, is appended hereto as Exhibit A. A copy of the opinion of the District Court, filed February 8, 1974, and not yet reported, is appended hereto as Exhibit B.

JURISDICTION

This suit was brought, as alleged by various of the Appellees, under 28 U.S.C.A. 1343, 2201 and 2281, and 42 U.S.C.A. 1983 and 1985(3), seeking essentially to have declared unconstitutional a Texas constitutional provision, viz., Article 5, Section 18, and a Texas statute, viz., Article 2351½(c), and to have set aside an Order of the Harris County Commissioners Court redistricting the County's eight justice of the peace and constable precincts, which Order by reason of the effect of the said Article 2351½(c) vacated the offices of five of the Appellees, three of whom were justices of the peace and two of whom were constables.

The judgment of the District Court was entered January 30, 1974, and notice of appeal was filed in that Court on February 4, 1974. On the same day that the notice of appeal was filed, Mr. Justice Powell granted an Order staying the execution and enforcement of the judgment of the District Court. On February 19, 1974, the Supreme Court entered an Order denying the Appellees' motion to vacate Mr. Justice Powell's stay order.

The jurisdiction of the Supreme Court to review the District Court's decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The fol-

lowing decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Turner v. Fouche,* 396 U.S. 346; *Sailors v. Board of Education of County of Kent,* 387 U.S. 105; *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89.

QUESTION PRESENTED

Where a State requires that its justices of the peace and constables reside in the precinct in which they are elected to serve, is it a violation of the equal protection guarantee for the State to provide that following a redistricting by a county of its justice precincts if in any precinct there reside an excessive number of justices of the peace or constables for the limited number of such positions authorized therein, such positions shall become vacant to be filled as other vacancies?

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 5, Sections 8, 18 and 24; Article 16, Sections 14 and 65, Vernon's Annotated Texas Constitution; Articles 1908, 2351½, 2355, Vernon's Annotated Texas Civil Statutes; Article 1.05, Vernon's Annotated Texas Election Code.

STATEMENT

Appellants, hereinafter referred to as the Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties and responsibilities of such a unit of state government were reviewed at length by the Supreme Court in *Avery v. Midland County, Texas,* 390 U.S. 474. Among such duties and responsibilities is that set out in Article 5, Section 18 of the Texas Constitution as follows:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. *Divisions shall be made by the Commissioners Court provided for by this Constitution.* In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. * * *" See Exhibit C.

The foregoing constitutional provision, embodied in the state's constitution ratified by the people of Texas on February 15, 1876, has been amended only once, on November 2, 1954, to the extent only of increasing the term of office of the officers in question from two to four years. As stipulated by the parties in this cause, Harris County was last divided into the eight precincts in question in the year 1876. To correct the evils attendant upon the severe malapportionment among such precincts that had developed in the ensuing 97 years, the Commissioners Court on January 12, 1973, appointed a committee of nine persons to study and recommend plans for redistricting such precincts as well as the county's four commissioner precincts. Such committee consisted of a county commissioner, a justice of the peace, a constable, a black, a chicano, a Republican, a Democrat, a woman and a University professor with expertise in working with redistricting plans.

After a considerable number of public meetings of the committee as well as public meetings held by the Commissioners Court, all of which were given wide publicity

in various newspapers throughout the county, the Commissioners Court on June 8, 1973, adopted a plan for redistricting the four county commissioner precincts which met the strict requirements of the one-man, one-vote principle of *Avery*, supra. Thereafter, on June 28, 1973, the Commissioners Court adopted a plan for redistricting the county's eight justice precincts to become effective July 1, 1973.

The stated purposes for redistricting the justice precincts were to eliminate to as great an extent as practicable the gross population disparities existing between such precincts, to more fairly apportion the workload of justices of the peace and constables because of the equal pay received by the respective officers within each class, to redraw the precincts in such a manner as to follow ethnic patterns where possible to promote minority participation, to provide a greater availability of services by authorizing a second justice in Precincts 2 through 8 which, unlike Precinct 1 which had two such positions, theretofore had had only one justice, and to redraw the precinct lines on the basis of census tract lines.

The population counts of the eight justice precincts, before and after the redistricting, follow:

Precinct	Before	After
1	999,424	343,765
2	436,974	146,054
3	111,106	169,997
4	81,879	175,769
5	6,966	337,844
6	8,848	180,101
7	11,976	238,401
8	84,739	149,981

Because of the exceedingly small population counts of Precincts 4, 5, 6 and 7 and of their geographical contiguity prior to the realignment, as a result of the redistricting new Precinct 4 was comprised of an area formerly made up of all of old Precincts 4, 5 and 7, and portions of old Precincts 3 and 6. See Exhibits D and E for the geographical outlines of the eight precincts before and after the redistricting. Because of the location of their respective residences, four justices of the peace and three constables of certain of these former precincts as they existed prior to redistricting, ended up as residents of the new Precinct 4.

Article 1.05 of Vernon's Annotated Texas Election Code (Exhibit F) requires that the person holding such an office as justice of the peace or constable reside in the precinct for which such office is filled. To provide for just such a situation as occurred here, i.e., when as a result of a redistricting of a county's justice precincts there are more than two justices or more than one constable ending up residing in a precinct as so changed than there are offices existing therefor, viz., two justice and one constable posts, the Texas Legislature in 1965 enacted Article 2351½, subsection (c) of which provides:

> "*When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished,* if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed. he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. *If more than one justice or*

constable resides within a precinct as so changed, or if none resides therein, *the office shall become vacant* and the vacancy shall be filled as other vacancies; provided, however, that *in precincts having two justices,* if two reside therein, both shall continue in office, and *if more than two reside therein, both offices shall become vacant.*" See Exhibit G.

Because of the fact that following the redistricting, four justices of the peace and three constables of the former precincts resided in new Precinct 4, the two justices of the peace and one constable positions authorized for such precinct were vacated by reason of the foregoing statute. The Commissioners Court then, under Article 2355, Vernon's Annotated Texas Civil Statutes, proceeded to fill such vacancies. On the day that the order of redistricting was passed, June 28, 1973, one of the Appellees herein, Moore, filed suit to enjoin such action in a State District Court, which under state constitutional Article 5, Section 8 and state statutory Article 1908, has appellate jurisdiction and general supervisory control over the Commissioners Court. The State Court on a hearing the following day denied a temporary injunction. Thereafter, on July 20, 1973, and without further exhausting the State remedy thus invoked, Moore, joined by Bolton, both deposed constables, and Doering, Mahan and Zaboroski, deposed justices of the peace, together with two citizens who had resided in one or the other of the old precincts and who now reside in new Precinct 4, viz., Appellees Boynton and Neeley, instituted suit in the United States District Court for the Southern District of Texas, Houston Division.

In its Opinion issued February 8, 1974, the District Court declared that insofar as Article 2351½ operates

to terminate the term of a duly elected justice of the peace or constable upon the circumstance that a redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so affected. Additionally, the District Court declared that the effect of such statute in cutting short the term of such officers also constituted an impermissible abridgement of the franchise of those voters who had been entitled to vote for them. Underlying both of these conclusions, the District Court found that no compelling state interest is served to justify such effects of the statute.

THE QUESTIONS ARE SUBSTANTIAL

A. The equal protection guarantee of the Fourteenth Amendment was in no way violated by the vacating of the offices in question, since such offices are local offices created for purely state purposes and their creation, rearrangement or abolishment for compelling state reasons relate solely to the internal administration of the state's political structure.

The issues involved in this appeal are similar to those raised in such cases as *Taylor v. Beckham,* 178 U.S. 548; *Higginbotham v. City of Baton Rouge, La.,* 306 U.S. 535; and *Snowden v. Hughes,* 321 U.S. 1. Generally, the issues involve the power of a State to provide for a policy with reference to its political and internal administration, and more particularly, its power to create for purely state purposes certain local offices and when compelling and justifying reasons call for its exercise, the power to abolish or vacate such offices.

In brief, the people of Texas by their constitution have vested in the Commissioners Court of each of the state's 254 counties the responsibility to divide, and when compelling and justifying reasons call for such, to redivide from time to time, its county into a certain number of precincts for the election within each of not more than two justices of the peace and one constable. Article 5, Section 18, Vern. Ann. Tex. Const. Additionally, the Legislature has prescribed that such precinct officers must be residents of the precinct in which they serve. Article 1.05, Vern. Ann. Tex. Election Code. In this case the Commissioners Court of Harris County, pursuant to its constitutional responsibility in the face of a compelling need to redistrict the county's eight precincts because of their severe malapportionment, realigned such precincts. Because the smallest precincts were contiguous one to another prior to the realignment, the redistricting necessarily resulted in one new precinct incorporating their area which in turn resulted in there being more justices and constables of such former precincts residing in the new precinct than there were positions authorized to be filled therein.

Prior to 1965 the judicially applied law of Texas under constitutional Article 5, Section 18 was such that following such a redistricting as occurred here, all of the justice and constable positions in all eight new precincts would have been considered vacant to be filled anew by appointment made by the Commissioners Court. In that year the Legislature enacted statutory Article 2351½, Vern. Tex. Civ. Stat., which provided that following such a redistricting a vacancy would occur only in such instances when no previously elected or appointed justice or constable resided in a new precinct, or when, as a result of the

realignment there resided in a new precinct an excessive number of such officers for the position or positions authorized therein. Otherwise, all such officers would be entitled to continue in office for the remainder of their elective or appointive terms.

What in reality is being challenged here is the right of the State to provide for the carrying out and enforcement of its policy with reference to its political and internal administration. In *Taylor v. Beckhan,* supra, the Supreme Court declared that "In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office." In *Higginbotham v. City of Baton Rouge, La.,* supra, the Supreme Court declared that "the legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service."

And in *Snowden v. Hughes,* supra, the Supreme Court distinguished between "rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law," and those rights of a citizen derived from his national citizenship. While as the District Court pointed out in its opinion, *Snowden* involved only a candidacy for office, it is submitted that in principle what the Supreme Court said in *Snowden* applies with no less force to the rights of the Appellees in the case at hand. The Court in *Snowden* declared that denial by state action of a right to state

political office is neither a denial of a right of property or liberty secured by the due process clause, nor a denial of the equal protection of the laws unless there is shown to be an element of intentional or purposeful discrimination. Notwithstanding that the Court below did not, and indeed could not, find an element of intentional or purposeful discrimination in the face of the overwhelming need for the redistricting and the manner in which the Commissioners Court of necessity had to realign the specific new precinct in question to achieve some degree of reasonable apportionment, it nevertheless concluded that there had been a denial of equal protection of the laws.

In *Sailors v. Board of Education of County of Kent,* 387 U.S. 105, the Supreme Court stated that "Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." As an example of a state attempt to defeat such a federally protected right the Court cited the realignment of political subdivisions in *Gomillion v. Lightfoot,* 364 U.S. 339, which involved an attempt to deny a person his vote because of race. No such invidious or discriminatory intention, or any other, formed the basis for the realignment of the justice precincts in the case at hand.

It is submitted that the compelling necessity for the redistricting of the county in the first place, coupled with the compelling state interest in requiring such precinct officers to reside in the precinct in which they serve, fully justified the vacating of the offices in question.

History Of The Texas Law

Article 5, Section 18 of the Texas Constitution was adopted by the people of Texas in the ratification of the

state's present constitution on February 15, 1876. Gammel's Laws of Texas, 1822-1897, Volume 8, page 779. The first reported state case to pass on this provision was that of *State ex rel. Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Civ. App. 1897, application for writ of error denied by the Texas Supreme Court at 43 S.W. 1101 for the reason that the case "was correctly decided in the court of civil appeals"). The Texas court declared:

> ". . . The power to divide the county into justices' precincts is also given by the statute, but not in terms so explicit as those used in the constitution. Rev. St. 1895, art. 1537. There can be no doubt that both constitution and statute confer the power, and the only question is as to its extent. *It is contended that a limitation upon the power is found in the constitutional provision fixing the terms of office* of precinct officers; *and that, since they are to hold for two years* (now four), *it follows that the precincts cannot be changed during the terms, because the power to alter them would practically enable the court to destroy the office.* The language of the constitution expresses no such limitation. The division is to be made 'from time to time.' The reason for the division is to be the convenience of the people; and the judge, both as to time and convenience is the court.
>
> * * *
>
> ". . . *the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts.* This is no anomaly in our law. All county officers whose compensation is derived from perquisites, and therefore depends to some extent on the territory in which they exercise their functions, hold their offices subject to lawful power to alter that territory. *While the office is property, it is held*

> *subject to the proper exercise of all such powers as these.* There is no contract between the state and its officers which forbids such action. Mechem, Pub. Off. § 855."

In the subsequent case of *Williams v. Castleman,* 247 S.W. 263 (Tex. Sup. Ct. 1922), the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

> ". . . The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time,' which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.
>
> * * *
>
> "It is thus seen that there is no limitation on the time when the commissioners' court may divide a county into justice precincts, and that, aside from the maximum and minimum prescribed in the Constitution, there is no limitation as to number. The Constitution does not state how the power of division by the commissioners' court shall be exercised, nor does the statute. * * * *It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."*

The holdings of *State ex rel. Dowlen v. Rigsby,* supra, and *Williams v. Castleman,* supra, have been unanimously

adhered to by the Texas courts in the following cases: *Hastings v. Townsend,* 136 S.W. 1143 (Tex. Civ. App. 1911, no writ history); *Turner v. Allen,* 254 S.W. 630 (Tex. Civ. App. 1923, error dismissed); *Ward v. Bond,* 10 S.W.2d 590 (Tex. Civ. App. 1930, no writ history); *Brown v. Meeks,* 96 S.W.2d 839 (Tex. Civ. App. 1936, error dismissed); *Meredith v. Sharp,* 256 S.W.2d 870 (Tex. Civ. App. 1953, error refused, n.r.e.).

In 1962, the Attorney General of Texas in an advisory opinion, No. WW-1251, February 2, 1962, declared the Texas law to be as follows:

> "The Commissioners' Court may abolish old justice precincts and re-divide the county into new justice precincts at any time, so long as there is a minimum of four and not more than eight justice precincts in the county. *When such justice precincts are abolished the offices in the old precincts become vacant and the officers of the newly created justice precincts must be appointed by the Commissioners' Court.*"

Considered in the light of the pre-existing state of the Texas law, the 1965 enactment of Article 2351½(c) was very obviously intended by the Legislature to ameliorate the effect of a redistricting on the vacating of offices. It was clearly intended to limit to as few as possible the number of vacancies theretofore caused by a redistricting, by requiring a commissioners court to retain in office all those officers residing in those newly-redistricted precincts which do not end up with a surplus of such officers to fill the limited number of positions authorized, keeping in mind the statutory requirement that such precinct officers must reside in the precinct which they serve. It is easily conceivable that in a redistricting

which does not involve the vastly disproportionate precincts which had to be contended with in this case, no new precinct would wind up with an excessive number of officers, resulting in no vacancies occurring.

Shortly after the statute was enacted the Attorney General of Texas in advisory Opinion No. M-68, May 8, 1967, construed section (c) to be a legislative usurpation of power constitutionally invested in a county commissioners court, declaring "that the Commissioners Court may, if they desire, effectuate a plan of succession of the type contemplated by Article 2351½(c), supra, but that their power to create vacancies or abolish offices cannot be taken away by the enactment of legislation." Had the Commissioners Court in this case adopted the view of the Texas Attorney General and ignored the statute, their redistricting action, in effectually abolishing all eight of the former precincts, would have resulted in vacating all of the justice and constable positions in all of the eight precincts, not merely in new Precinct 4. To what then would a Fourteenth Amendment equal protection claim attach? In such case all of the justices and constables in all eight of the county's precincts would have had their offices vacated and all, together with all of the voters residing in each of the precincts, would have been treated equally and alike. In such event, the Appellees would have been reduced merely to the claim that having once succeeded to the state offices in question they could not be divested of same by any state action no matter how compelling the need for a reapportionment of the precincts, or failing that, that the requirement that they reside in the precinct for which the office has been created is federally untenable. We submit that they would fail on either ground for reasons hereinafter set out.

Compelling State Interests Were Indeed Served By The Redistricting And Article 2351½(c)

A studied view of Exhibit D appended hereto, depicting the outlines of the eight precincts before the redistricting, considered in the light of the population of each of such precincts, can leave no doubt of the compelling need for the redistricting action. Such precincts had not been redistricted since the year 1876, and the severe malapportionment resulting therefrom is evidenced by the population counts earlier set out. These ranged from the low figures of 6,966, 8,848 and 11,976 in Precincts 5, 6 and 7, respectively, to the high figures of 999,424 and 436,974 in Precincts 1 and 2, respectively. Obviously, the services affordable by one justice and one constable to the residents in Precinct 2 with its population of 436,974 would on the face of it clearly seem to be grossly unequal to the same services from a like number of such officers available to the residents of Precinct 5 with its count of 6,966. Additionally, the salaries for all of the justices were the same in each of the precincts, as were those for each of the constables, which in itself was unequal treatment for those officers serving in the vastly more densely populated precincts. The evils of so severe a malapportionment of precincts as existed here prior to the redistricting are self-evident.

With regard to the District Court's view that no compelling state interest is served by the effect of Article 2351½(c) of vacating offices in some precincts upon the circumstance that a redistricting might result in there being more officeholders than there are authorized positions therefor in such precincts, it is submitted that Texas' statutory requirement that a justice or constable be a resident of the precinct which he serves is indeed a state

interest which is compelling enough to justify the effect of such statute. Article 1.05, Vern. Ann. Tex. Election Code, prescribes a six months pre-election residency requirement for such offices and in the case of *Whitmarsh v. Buckley,* 324 S.W.2d 298 (Tex. Civ. App. 1959, no writ history), in which a portion of one school district was deannexed and added to another and the plaintiffs were seeking to enjoin two trustees of the reduced district from continuing to serve because they no longer resided in such district by reason of the deannexation, the Texas Court of Civil Appeals declared:

> "We think the term 'precinct' is used in a general sense to include all political units within the county, except municipal, that are less than county-wide in area. *The evident purpose of the statute is to require representation of a political unit by one who is elected who resides in the unit which he is to serve.* It is true that it does not deal specifically with removal from office upon cessation of residence once a person has been elected, but it would in effect be meaningless if it is interpreted as restrictive only of residence at the time of election and qualification. If it is so restricted, a person could be elected and qualify and then move out of the political unit and yet continue to act in an official capacity when he is no longer affected by the acts he performs. A statute should be liberally construed to effect the intention of the legislature. *It has ever been traditional with Texas to require representation by elective officers who are residents of the political unit for which the elected officer acts.*"

In *Hadnott v. Amos,* 320 F. Supp. 107 (1970), affirmed by the Supreme Court at 401 U.S. 968, the three-judge United States District Court for the Middle District of

Alabama, in passing on a similar Alabama statute which required a twelve-month pre-election residency, *as well as residency during continuance in office,* for circuit judges of that state, declared the following:

> "The State of Alabama has a compelling state interest in exposing to the voters for a substantial period of time before election the person who will be a candidate for state circuit judge.
>
> * * *
>
> "We consider it to be of urgent importance that the voter have an opportunity to observe, learn about and appraise those who seek to be candidates for a key judicial office that touches important events and relationships of their lives and of the community in which they live. There are innumerable qualities and qualifications that are relevant."

No less important considerations apply to a Texas justice of the peace. Justice courts exercise original jurisdiction in all civil cases where the amount in controversy is two hundred dollars or less; in all cases of forcible entry and detainer, and all cases involving foreclosure of mortgages and the enforcement of liens on personal property, where the amount in controversy is within their jurisdiction; they have the power to issue writs of attachment, garnishment, and sequestration within their jurisdiction; they act as a Small Claims Court in all actions for the recovery of money, not exceeding the sum of one hundred fifty dollars; they have jurisdiction in all criminal cases involving misdemeanors for which the fine to be imposed does not exceed two hundred dollars; they have the power to issue warrants of arrest, advise an accused of his rights, set bail without restrictions as to amount; conduct examining trials, commit defendants to jail; and

to take forfeiture of all bonds given for the appearance of any party at their courts, regardless of amount. Article 2385 et seq., 2460a, Vern. Ann. Tex. Civ. Stat.; Articles 4.11, 15.01 et seq., 16.01 et seq., 4.13, Vern. Ann. Tex. Code of Crim. Proc.

In *Detroit Police Officers Ass'n v. City of Detroit,* 190 N.W.2d 97 (Mich. Sup. Ct. 1971), appeal dismissed "for want of a substantial federal question" by the United States Supreme Court at 405 U.S. 950, the Michigan Supreme Court, in striking down a constitutional challenge against a city ordinance requiring that police officers reside within the City of Detroit declared:

> "The job of a policeman does have 'natural distinguishing characteristics' from all other city employees. There is a special relationship between the community policed and a policeman. A policeman's very presence, whether actually performing a specified duty during assigned hours, or engaged in any other activity during off duty hours, provides a trained person immediately available for enforcement purposes." Also, see *Ahern v. Murphy,* 457 Fed.2d 363.

The same considerations of course apply to the Texas requirement that a constable reside within the precinct in which he serves. He, like any city policeman, is also a peace officer authorized to make arrests. Additionally, he is charged with executing all process, warrants and precepts, and attending upon the justice courts in his precinct. Article 6878 et seq. The Texas requirement that its justices and constables live within the specific precincts for which they are elected or appointed to serve is not at all unlike the federal requirement that District Judges and Marshalls reside in the districts for which they are appointed to serve. 28 U.S.C.A. 134 and 561.

With regard to the District Court's view that it was not compelling that the offices in question be vacated inasmuch as Section (b) of the statute in question which provides that the term of office of a county commissioner is not to be affected by a redistricting, even though its effect may be to place his residency outside the precinct for which he is elected, the same contention was raised by the litigants in the Texas case of *Whitmarsh v. Buckley,* supra, and disposed of by the Texas court as follows:

> "We find nothing in our holding contrary to the case of Childress County v. Sachse, Tex. Civ. App., 310 S.W.2d 414, writ refused, n.r.e. Tex., 312 S.W. 2d 380. In that case the Court held that a county commissioner, who was no longer a resident of the precinct from which he was elected because the Commissioners Court had changed the precinct lines, did not thereby vacate his office. However, a county commissioner is merely elected from a precinct that is created for the convenience of the people under the mandate of Article 5, Section 18 of the Constitution. He is not, however, an officer of that political subdivision. He is a county officer serving the entire county as a member of the Commissioners Court, which as a body is the governing unit for the whole county. He is elected, not to act authoritatively for just his precinct. He is elected to serve the whole county. In the Sachse case, Sachse still lived in the political unit he was elected to serve, to wit, Childress County."

The holding in *Childress County v. Sachse,* referred to above, was subsequently embodied as section (b) of Article 2351½. See *Villareal v. Bustamente,* 480 S.W.2d 231 (Tex. Civ. App. 1972, no writ history). And with it clearly in mind, the Legislature provided for a different

handling of justices and constables in section (c) thereof, obviously with the residency requirement in mind.

The District Court also took the view that it was not necessary to effect the redistricting in question in mid-term under the apparent impression that it could have been done so as to coincide with the expiration of the terms of the officers in question so that such terms would not have been cut short; however, under Article 16, Section 65 of the Texas Constitution, providing for the staggering of the various terms of the offices in question, no redistricting could ever be effected which would not cut short the term of office of at least some of the officers in question. Article 16, Section 65 provides for staggering the terms of office of justices of single justice precincts with constables so that such justices are elected at one general election for four years and constables are elected at the following general election for four years. In the case of a two justice precinct, as was Precinct One prior to the redistricting and as all are following the redistricting, the justice of the uneven place number, viz., No. 1, runs at one general election for four years and the justice of the even place number, viz., No. 2, runs at the following general election for four years. In *Pate v. El Paso County, Texas,* 324 F. Supp. 935, affirmed by the Supreme Court at 400 U.S. 806, the validity of this constitutional provision, insofar as it provides for staggered terms for County Commissioners of even versus uneven numbered precincts was upheld on the ground that it "insures that the commissioners court have some continuity in its membership and experience, thereby providing for more efficient and effective county government." The same considerations would of course apply to justify the staggering of the terms of office as between justices of even versus uneven

numbered positions within a precinct as well as the staggering provided for between justices and constables.

With regard to the District Court's view that the effect of Article 2351½(c) to prematurely end the term of office of the five Appellee officeholders constituted an impermissible abridgement of the franchise of those entitled to vote for them, it is difficult to reconcile such view with the holding of *Pate v. El Paso County, Texas,* supra. In *Pate,* as a result of redistricting certain voters were transferred from commissioner precinct two to commissioner precincts one and three. While their complaint was of the postponement of their right to vote for a commissioner of their choice for another two years because of the staggering effect of Article 16, Section 65, it is clear that after the realignment they would no longer be represented by the officer for whom they had been entitled to vote at the last election. Whether as a result of the realignment of the precincts, a voter is no longer represented by the officer he was entitled to vote for at the last election either by reason of the fact that the realignment puts him outside the new precinct in which the officer continues to serve or by reason of the fact that the officer's term has been cut short by reason of the effect of Article 2351½(c) the effect is the same on the voter. In either case after a realignment he is no longer represented by the officer or officers he had been entitled to vote for at the last election. In any event the need to correct the severe malapportionment existing in the precincts prior to the Commissioners Court's redistricting action in this case would surely be a compelling enough state interest to override the interests of voters in any particular precinct to have the continued service of the officer or officers for whom they had been entitled to vote at the last election. *Pate*

v. El Paso County, Texas, supra; *Carr v. Brazoria County, Texas,* 341 F. Supp. 155, affirmed 468 Fed. 2d 950; *Robinson v. Zapata County, Texas,* 350 Fed. Supp. 1193.

B. The District Court should have abstained from deciding this cause to afford the Texas courts the opportunity to determine the question of whether or not residency within the county, as distinguished from residency within a precinct, is required under the state constitution, the resolution of which in favor of Appellees would render unnecessary a federal constitutional decision.

The validity of Article 2351½(c), under either the state or federal constitutions, has never been passed on by the Texas Supreme Court. In only one Texas Court of Civil Appeals decision has such a court been confronted with the actual application of section (c) of the statute. In *Villareal v. Brooks County,* 470 S.W.2d 60 (Tex. Civ. App. 1971, no writ history), a justice of the peace whose office had been determined to be vacated by reason of a redistricting, like Appellees here, filed suit to determine title to the office. The trial court ruled against his reinstatement to office and on appeal, the Court of Civil Appeals declared that the evidence was conclusive that he had established a new residence within the new precinct prior to the time the redistricting became effective, and since he was the only previously elected or appointed justice living within the boundaries of the new precinct he was entitled to have continued in office for the remainder of the term to which he had been elected. His term having expired before the appellate court's decision, such

officer recovered his salary from the time he was ousted from office to the date of expiration of such term.

Villareal clearly evidences the adequate state remedy available to the Appellees here, but, of especial significance to the case at hand, is what the Court of Civil Appeals declared as follows:

> "In view of the disposition we have made of this case, *we do not consider appellant's contention that, since the office of justice of the peace is a county office, only residence within the county, as distinguished from residence within the justice precinct, is constitutionally required and that, therefore, Article 2351½, insofar as it attempts to make residence within the precinct a qualification for continuing in office, is unconstitutional.* Nor do we consider the contention that the order of January 13, 1969, is void as a violation of the 'one man, one vote' rule promulgated by the Supreme Court of the United States in several reapportionment cases."

Appellees in this case, like the Plaintiff in *Villareal,* have of course also advanced the contention that being classed as "county officers" under Article 5, Section 24 and Article 16, Section 14 of the Texas Constitution, their residence need only be in the county and not in a particular precinct and, therefore, a redistricting which leaves their residences outside of the precincts in which they were elected but still within the county, would not effect a vacating of their offices. They contend that under the state constitution they should be treated no differently than are the county commissioners under section (b) of the statute. Thus if the Texas Supreme Court should rule that the positions of a justice of the peace and/or constable are "county offices" under the state constitutional pro-

visions and only residence within the county, as distinguished from residence within the justice precinct is required, Article 2351½(c) and Article 1.05 of the Texas Election Code, insofar as they attempt to make residence within the precinct a qualification for continuing in office following a redistricting, would be unconstitutional under the state constitution. Such holding would of course be favorable to Appellees and would avoid a federal constitutional decision under the Fourteenth Amendment.

The United States Court of Appeals for the Fifth Circuit on almost this identical question, in *Romero v. Coldwell,* 455 F.2d 1163, abstained from deciding whether the jurisdiction of a Texas justice of the peace was county-wide or confined to his precinct. In a class-suit seeking the application of the one-man, one-vote concept to justice precincts in El Paso County, Texas, the plaintiffs contended that a Texas justice of the peace has county-wide jurisdiction as opposed to that merely for his precinct and, therefore, one-man, one-vote should apply in the apportionment of a county's justice precincts. The United States Court of Appeals, unlike the District Court below which concluded that such jurisdiction is state-wide, citing only Texas statute Article 2385, with which conclusion Appellants strenuously disagree, exhaustively reviewed the Texas law relating to the question and concluded that "(C)ontroversy in Texas over the extent of jurisdiction of justices of the peace appears to be of long standing." The Circuit Court of Appeals, in modifying the lower court's dismissal with prejudice to one without, abstained to allow the litigants to afford the Texas courts the opportunity to pass on the question, the resolution of which, the Court pointed out, might well obviate the necessity of determining the federal constitutional question.

Abstention also was recently applied in two other Texas federal cases, both of which ironically involved Article 2351½, but county commissioner redistricting under section (a) rather than section (c), *Carr v. Brazoria County, Texas,* 341 F. Supp. 155, affirmed 468 Fed. 2d 950; *Robinson v. Zapata County, Texas,* 350 Fed. Supp. 1193. In *Carr* the Court noted that "portions of Article 2351½ have twice been deemed void under the State Constitution in advisory opinions of the Attorney General of Texas. See Op. Atty. Gen. No. M-68 (May, 1967); Op. Atty. Gen. No. M-562 (January, 1970). Finally, although the statute has been on the books since 1965, this Court is not aware that Article 2351½(a) has ever been authoritatively construed in any reported opinion of any Texas court." In *Robinson* the Court declared that before it sets out to determine what the statute means or decides the fate of the litigants, "the Texas courts should have a chance," citing *Harris v. Samuels,* 440 F.2d 748 (5th Cir. 1971), cert. den. 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62.

To further muddy the waters as to the lack of clarity in the Texas law, Appellants would note that the Texas Attorney General has again issued another advisory opinion which, while it does not treat of Article 2351½(c) specifically, stirs even more the confusion now heavily rampant in Texas about the very question involved in this case. In Tex. Atty. Gen. Op. No. H-220, January 29, 1974, it is concluded that "Justices of the peace and constables, elected to a full term, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice or constable not living in his precinct, does not vacate his office."

In reaching such conclusion the Texas Attorney General relied on the Texas Court of Civil Appeals decision of *McGuire v. Hughes,* 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history). Aside from the fact that *McGuire* did not involve a redistricting and, therefore, did not address itself to Article 2351½(c), and was, therefore, erroneously relied on, the Texas Attorney General Opinion flies in the face of not only the statute itself, but the Texas Supreme Court's approval of *State ex rel. Dowlen v. Rigsby,* supra; the Texas high court's own holding in *Williams v. Castleman,* supra; and the even more recent cases of *Villanueva v. Harville,* 419 S.W.2d 711 (Tex. Civ. App. 1967, no writ history), which on the almost identical facts of *McGuire,* found an opposite result; and *Telles v. Samples,* 500 S.W.2d 677 (Tex. Civ. App. 1973, writ history as yet unreported).

In *Telles* the plaintiff had been elected in the November 1972 general election as constable of precinct number one of El Paso County, Texas. In December the commissioners court ordered a redistricting effective January 1, 1973, reducing the county's justice precincts from eight to six and thereby eliminating plaintiff's position. In upholding a denial of the plaintiffs application for a mandamus to compel payment of his salary, the Court of Civil Appeals declared:

> "If the Commissioners Court has the authority to set the number of precincts at not less than four nor more than eight, it must have the authority to reduce

> the total number from eight to six, as was done in this instance. This necessarily means some elected officials will not be able to qualify and serve when redistricting takes place between the time of the election and the date such officials take office. But we find no constitutional or statutory time limit on when the Commissioners Court may order a redistricting plan into effect."

Because of the present state of turmoil in the Texas law revolving around the issue of whether justices of the peace and constables are "county officers," whose residences need only be within the county as distinguished from residence within a precinct, and that therefore, Article 2351½(c) insofar as it attempts to make residence within the precinct a qualification for continuing in office following a redistricting, would be unconstitutional under the state constitution, and because the Texas Supreme Court might well resolve this question in favor of the Appellees and thereby render unnecessary a federal constitutional decision under the Fourteenth Amendment, it is submitted that the District Court should have abstained from deciding this cause under the principles laid down in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, as was done in *Romero v. Coldwell, Carr v. Brazoria County, Texas* and *Robinson v. Zapata County, Texas,* supra.

CONCLUSION

It is submitted that the questions presented by this appeal are substantial and that they are of public importance for which reasons it is prayed that probable jurisdiction be noted.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

By Edward J. Landry
EDWARD J. LANDRY
Senior Assistant County Attorney

By Michael R. Davis
MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151

Attorneys for Appellants

CERTIFICATE OF SERVICE

(1) The undersigned counsel for the Appellants do hereby certify that on this 3rd day of April, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Jurisdictional Statement."

VIRGIL H. BARFIELD
Attorney in Charge
For Plaintiffs, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel
For Plaintiffs, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

DAVID HOLLINGSWORTH
Of Counsel
For Plaintiffs, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

JOHN M. O'QUINN
Attorney in Charge
For Intervenor-Petitioners
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
Attorney in Charge
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

GERALD A. WOOLF
Of Counsel
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

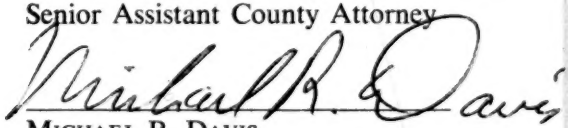
LARRY B. KERFOOT
Attorney in Charge
For Plaintiff Blackie Neeley
910 Houston Bar Center Bldg.
Houston, Texas 77002

WESLEY H. HOCKER
Attorney in Charge
For Intervenor-Petitioners
Harris County Democratic Executive Committee
1020 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

(2) All parties required to be served have been served.

Signed:

EDWARD J. LANDRY
Senior Assistant County Attorney



MICHAEL R. DAVIS
Assistant County Attorney

Attorneys for Appellants

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A —Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit D — Precinct Map before dedistricting

Exhibit E — Precinct Map after redistricting

Exhibit F — Article 1.05, Vernon's Annotated Texas Election Code

Exhibit G — Article 2351½, Vernon's Annotated Texas Civil Statutes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOF THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos, 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and a a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V, Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S. C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are

1. Tex. Const. Art. 5, §18.

> altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices. These offices are the creation of state law; the jurisdiction

of the offices in question is statewide,[2] and the statute attacked is of statewide effect and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commisisoners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

EXHIBIT D

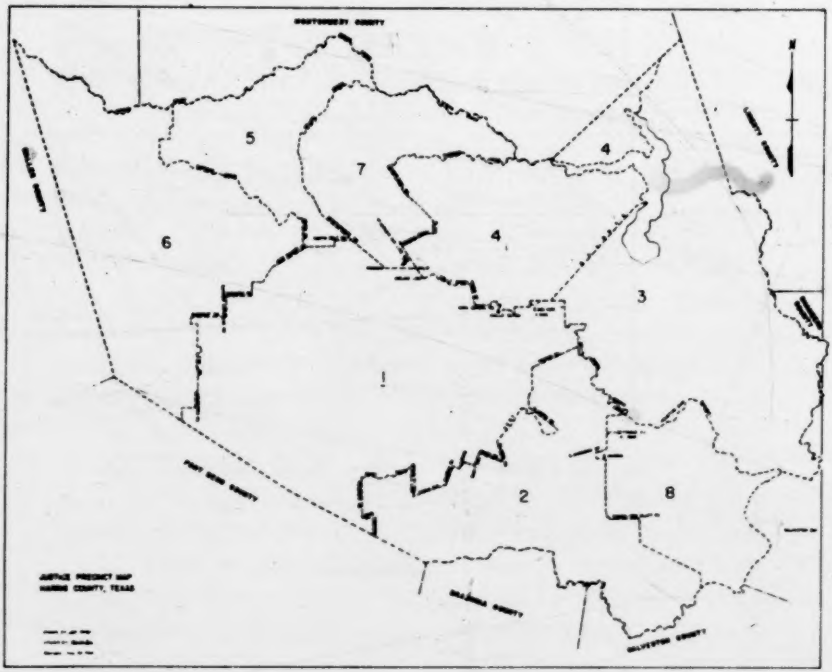


EXHIBIT E

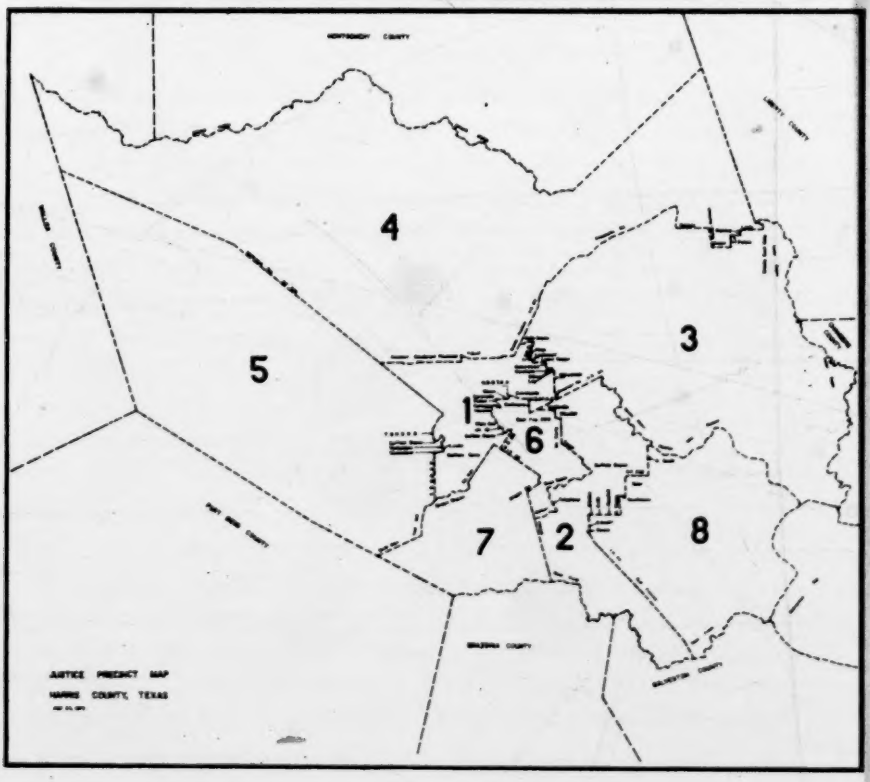


EXHIBIT F

TEXAS ELECTION CODE

Art. 1.05. Ineligibility

No person shall be eligible to be a candidate for, or to be elected or appointed to, any public office in this state unless he is a citizen of the United States eligible to hold such office under the Constitution and laws of this state and is under none of the disabilities for voting which are stated in Article VI, Section 1 of the Constitution of Texas on the date of his appointment or of the election at which he is elected, and unless he will have resided in this state for a period of twelve months next preceding the applicable date specified below, and for any public office which is less than statewide, shall have resided for six months next preceding such date in the district, county, precinct, municipality or other political subdivision for which the office is to be filled:

(1) For a candidate whose name is printed on the ballot for a general (first) primary election, the applicable date is the last day on which any candidate for the office involved could file his application to have his name printed on the ballot for that primary election.

(2) For an independent or nonpartisan candidate in a general or special election, the applicable date is the last day on which the candidate's application for a place on the ballot could be delivered to the appropriate officer for receiving the application.

(3) For a write-in candidate, the applicable date is the day of the election at which the candidate's name is written in.

(4) For a party nominee who is nominated by any method other than by primary election, the applicable date is the day on which the nomination is made.

(5) For an appointee to an office, the applicable date is the day on which the appointment is made.

The foregoing requirements shall not apply to any office for which the Constitution or statutes of the United States or of this state prescribe qualifications in conflict herewith, and in case of conflict the provisions of such other laws shall control.

Except as provided in Section 104 of the code,[1] no ineligible candidate shall ever have his name placed upon the ballot at any primary, general or special election. No ineligible candidate shall ever be voted upon nor have votes counted for him at any such primary, general or special election for the purpose of nominating or electing him, but votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election. No person who advocates the overthrow by force or violence or change by unconstitutional means of the present constitutional form of government of the United States or of this state, shall be eligible to have his name printed on any official ballot in any general, special or primary election in this state.

Amended by Acts 1967, 60th Leg., p. 1861, ch. 723, § 4, eff. Aug. 28, 1967.

EXHIBIT G

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commisisoners precincts are changed, the terms of office of the commisisoners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that

precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

---

MOTION TO DISMISS OR AFFIRM

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

Attorneys for Gene Zaboroski

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
1. Appellants have attempted to confuse or mislead this Court in the manner in which they have stated the "Questions Presented" on page three of their Jurisdictional Statement	4
2. Appellee contends that the provisions of Article 2351½ are constitutionally lacking	5
A. The right to vote: The right to hold elective office	7
B. Equal protection—the one man—one vote rule	9
C. Equal protection—Discrimination on the basis of race, ethnic origin or political affiliation	12
D. Equal protection—Discrimination between members of the same class	14
Conclusion	18
Certificate of Service	19
Exhibit A	21
Exhibit B	22

LIST OF AUTHORITIES

CASES

	Page
Anderson v. Martin, 375 U.S. 399	12
Avery v. Midland County, 390 U.S. 474	7, 8, 10
Brewer v. Hoxie School District No. 46, 238 F.2d 91	9
Cooper v. Aaron, 358 U.S. 1	12
Dyer v. Love, 307 F.Supp. 974	7
Ellis v. Mayor of Baltimore, 234 F.Supp. 945 (D. Md. 1964)	11
Ex Parte Yarborough, 110 U.S. 651	7
Gomillion v. Lightfoot, 364 U.S. 339	12, 13
Gray v. Sanders, 372 U.S. 368	10
Hunter v. Erickson, 393 U.S. 385	14
Hyden v. Baker, 286 F.Supp. 474 (M.D. Tenn. 1968)	11
Kaelin v. Warden, 344 F.Supp. 598 (E.D. Pa. 1971)	10
Louisiana v. U. S., 380 U.S. 145	12

CASES

	Page
Loving v. Virginia, 388 U.S. 1	13
Martinolich v. Dean, 256 F.Supp. 824 (M.D. Miss. 1966)	11
Mayo v. Lakeland Highlands Canning Co., 390 U.S. 310	2
McDonald v. U. S., 9 F.2d 506 (8th Cir. 1925)	9
Reynolds v. Sims, 377 U.S. 533, 555 (1964)	7, 9, 10, 11, 13
Roman v. Sincock, 377 U.S. 695	11
Sailors v. Kent Board of Education, 387 U.S. 105	7, 10, 12
Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965)	12, 13
Standard Computing Scale Co. v. Farrell, 249 U.S. 571	12
Strickland v. Burns, 256 F.Supp. 824 (M.D. Tenn. 1966)	11
U. S. v. Corrick, 298 U.S. 435	2
U. S. v. Mississippi, 380 U.S. 128	12
U. S. v. Patrick, 55 F. 338 (M.D. Tenn. 1893)	9
Whitcomb v. Chavis, 403 U.S. 124	13

TEXAS REVISED CIVIL STATUTES

Article 2351½ 3, 4, 5, 6, 8, 15, 16, 17

TEXAS CONSTITUTION

Article V, Section 18 ..... 3, 14, 16, 17
Article V, Section 24 ..... 14, 16, 17

UNITED STATES CONSTITUTION

Fourteenth Amendment 13, 16
Fifteenth Amendment 12

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

---

MOTION TO DISMISS OR AFFIRM

Comes now, Gene Zaboroski, one if the Appellees in this cause and moves this Honorable Court to dismiss the appeal herein, on the grounds that it has no jurisdiction or in the alternative to accept jurisdiction and affirm the judgment of the United States District Court for the Southern District of Texas, Houston Division, sought to be reviewed on appeal on the grounds that it is manifest that the question on which the decision of the cause

depends are so unsubstantial as not to need further argument.

In support of the Motion to Dismiss or Affirm and in opposition to the jurisdiction of this Court, Appellee submits the following statements disclosing matters or grounds against the jurisdiction of this Court.

I.

The Harris County Commissioners Court attempts to appeal from an order of the United States District Court for the Southern District of Texas, which declared Texas Statute, Article 2351½, Vernon's Civil Statutes, facially unconstitutional and issued an injunction against Appellants permanently enjoining them from redistricting the Justices of the Peace of Harris County under Texas Statute, Article 2351½, Vernon's Annotated Civil Statutes.

This Court has jurisdiction only if the decisions or orders of the court below were based on the invalidity or unconstitutionality of a state statute, and if Appellant has complied with all rules of this Court.

Rule 15, Supreme Court Rules, requires that if an appeal is from a decree of a district court granting or denying an interlocutory injunction, Appellant's Jurisdictional Statement must also include a showing of the matters in which it is contended that the Court has abused its discretion by such actions. *United States v. Corrick,* 298 U.S. 435; *Mayo v. Lakeland Highlands Canning Co.,* 309 U.S. 310.

Appellants' Jurisdictional Statement does not contain any allegations or showing of matters wherein the District Court has abused its discretion and therefore under Rule

16 (a), Supreme Court Rules this Court should deny jurisdiction.

If, however, this Court accepts jurisdiction in this cause then Appellee moves that the judgment of the United States District Court below be affirmed on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and in support thereof submits the following; to-wit:

II.

Judge Gene Zaboroski was elected Justice of the Peace by the voters of Precinct No. 6 in Harris County, Texas in the general elections of November 1970. His term of office as Justice of the Peace commenced on January 1, 1971, and he was to serve as Justice of the Peace until December 31, 1975. However, on June 30, 1973 the Harris County Commissioners Court, a constitutionally created body responsible for, among other duties, the supervision, control, and administration of certain voting laws enacted by the Texas Legislature, passed a redistricting order reconstituting certain Justice of the Peace and Constable Precincts including Precinct No. 6. This redistricting order was effected through the power granted to the Commissioners Court pursuant to the mandates of Article V., Section 18, Texas Constitution and Article 2351½, Texas Civil Statutes (1971). As intended and effected, ordered redistricting created new precincts primarily on the basis of racial, ethnic, and political lines, without regard to the mandates of the one man—one vote rule. As a result of the Commisisoners Court's actions, Appellee Gene Zaboroski was removed from his elected office.

1.

APPELLANTS HAVE ATTEMPTED TO CONFUSE OR MISLEAD THIS COURT IN THE MANNER IN WHICH THEY HAVE STATED THE "QUESTIONS PRESENTED" ON PAGE THREE OF THEIR JURISDICTIONAL STATEMENT.

The question raised by the findings and order of the Three-Judge District Court is a relatively simple one and is confined to the single question, "Is Article 2351½ (c) facially unconstitutional?"

The opinion of the Three-Judge District Court held that there was no compelling state interest served by the acts of the County Commissioners which "operates to truncate the term of a duly elected public official upon the circumstance that mere convenience redistricting places him in a district with others," and that "it invidiously and irrationally discriminates between him [Justices of the Peace] and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise were not so bobbed." (J.S. at 39).[1] In Appellant's Jurisdictional Statement they cite several state interests which allegedly were served by the redistricting of the Justice of the Peace and attempt to argue that such interests were compelling state interests if Appellees or the Court cannot show an element of intentional or purposeful discrimination against those Justices of the Peace removed from office. (J.S. at 11)

Appellants are again apparently confused as to the burdens of the respective parties in showing discrimination and alleged compelling state interests. They are obviously

1. References to J.S. are to Appellants' Jurisdictional Statement.

under the mistaken impression that discrimination by state action is permissible unless there is shown an element of intentional or pursposeful discrimination. This is not so. The courts have uniformly held that it is not necessary to show an element of intentional or purposeful discrimination in order to establish unequal protection under the constitution, but rather the burden is upon the Commissioners Court to justify their discriminatory actions with a compelling state interest.

Appellants allege as a compelling state interest for redistricting the Justices of the Peace and Constables Precincts the fact of their malapportioned population. Appellants have seemed to lost sight of the fact that Appellees are not contesting the fact that a malapportioned population among the Justices of the Peace and Constables Precincts might be a compelling state interest for redistricting. But, rather, Appellees are concerned primarily with the application of Article 2351½ to the redistricting ordered by the Harris County Commissioners Court.

2.

APPELLEE CONTENDS THAT THE PROVISIONS OF ARTICLE 2351½ ARE CONSTITUTIONALLY LACKING.

Sections (a) and (c) of the Article provide:

> "(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justices precincts it may specify in its order a future date, not later than the first date of January following the next general election, on which the changes shall become effective.
>
> If an election for any precinct office is held before the effective date of the order, the office shall be filled

at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precincts not having been in existence for that length of time."

"(c) When boundaries of justices of the peace precincts are changed so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term for which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed or if none reside therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein both shall continue in office, and if more than two reside therein, both offices shall become vacant."

The failure of the statute to *require* the Commissioners Court to delay the effective date of a change in boundaries, or redistricting, of a Justice of the Peace Precinct until "the 1st day of January following the next general election" constitutes a denial of the right to vote, denial of the right to hold office and fosters unequal protection of the law. Both the Texas Constitution and the Texas Statutes provide that the office of Justice of the Peace is elective; however, Article 2351½ circumvents both the right to vote for Justices of the Peace and the election procedure established for such voting. Additionally, Article 2351½ deprives the voters of their equal protection

rights, in that the right to vote for Justices of newly created precincts is guaranteed in some precincts and arbitrarily denied in others. Furthermore, this article deprives Appellee Gene Zaboroski of his right to hold office without due process of law in that there are no guarantees provided against summary removal or removal without cause.

A. The Right to Vote: The Right to Hold Elective Office.

In *Dyer v. Love*, 307 F. Supp. 974, 931 (N.D. Miss. 1969) the court restated the fundamental concept of the right to vote:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Accord, Reynolds v. Sims, 377 U.S. 533, 555 (1964). See also, *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967) (right to vote for legislative officers); *Ex Parte Yarborough*, 110 U.S. 651 (1884) (right to vote in Federal elections).

Even in the limited instances where the right to vote has not yet been specifically recognized as constitutionally required, as for certain state and local offices, the right to equal protection exists. That is, when a right to vote for certain state or local officials has been conferred by the state laws, that right must not be conferred in an arbitrary or invidiously discriminatory manner. In *Avery*

v. Midland County, 390 U.S. 474 (1968), the Supreme Court held:

> "Although the forms and functions of local government and the various units are matters of state concern, it is now beyond question that a state's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the state. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law."

390 U.S. at 480.

> "The equal protection clause does not, of course, require that the state never distinguishes between citizens but only that the distinctions that are made not be arbitrary or invidious."

Id. at 484.

Undeniably the State of Texas has conferred upon its citizens the right to vote for Justices of the Peace. It also has, however, arbitrarily abridged that right as applied to certain voters. Article 2351½ denies to citizens in certain newly created precincts the right to vote, yet arbitrarily maintains that right for others. The acts of the Harris County Commissioners Court in promulgating its redistricting order of June 28, 1973, and appointing Justices of the Peace to replace certain elected officials is likewise a discriminatory abridgement of the right to vote and of the right to hold elective office.

This second right to hold office and discharge the duties of the office is similarly important.

In *United States v. Patrick*, 55 F. 338, 349 (M.D. Tenn. 1893), the court held:

> "An office is a public employment, conferred by appointment of government, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right or privilege and a public duty."

Cf. McDonald v. United States, 9 F.2d 506 (8th Cir. 1925).

A local officer such as a Justice of the Peace is required in the administration of his duties to obey and uphold the Federal Constitution. This duty has a necessary corollary the Federal right to be free from direct and deliberate interference with performance of the Constitutionally imposed duty. See, e.g., *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) (School district directors and superintendent held to have a constitutional right to discharge the duties of their office.) Whether the right to hold office is abridged by a deliberate interference with official duties as in *Brewer*, or by complete ouster without cause or due process, as in this case, would seem to matter little; the effect is the same.

B. Equal Protection—The One Man—One Vote Rule.

In *Reynolds v. Sims*, supra, the equal protection clause was applied to the apportionment of state legislature. The court held that every qualified resident had the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that such right was infringed when legislators were elected from districts of substantially unequal population.

The Supreme Court sought to clarify *Reynolds* in *Sailors v. Kent Board of Education*, supra and to identify the circumstances in which application of the one man—one vote rule was required. The court noted that there was no constitutional requirement that state and local officers of non-legislative character be chosen by election rather than appointment. However, the question of the applicability of the rule where elections was required was left opened and the court held, assuming arguendo "that where a state provides for an election of a local officer or agency—whether administrative, legislative or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met," 387 U.S. at 111.

This open question was substantially resolved by *Avery v. Midland County*, supra, decided shortly thereafter:

> "The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As almost every court which addressed itself to this question, we hold that it does."

ID. at 478-479. See also the cases in which the highest state courts applied the principles of *Reynolds* to units of local government, collected at 390 U.S. 479 n. 3.

The one man-one vote rule has been applied with great breath: it has been held to govern the election of County Commissioners, *Avery v. Midland County*, supra; *Kaelin v. Warden*, 344 F. Supp. 598 (E.D. Pa. 1971); and Justices of the State Supreme Court and Courts of Appeal *Gray v. Sanders*, supra.

In *Gray* the court held that the rule must be applied to elected state executive and judicial officers as well as to their legislative brethren.

> "[O]nce the class of voters is chosen and their qualifications specified we see no constitutional way by which equality of voting power may be abated."

372 U.S. 381. *Accord, Ellis v. Mayor of Baltimore,* 234 F. Supp. 945 (D.Md. 1964), aff'd and remanded 352 F.2d 123 (4th Cir. 1965); *Hyden v. Baker,* 286 F. Supp. 475 (M.D. Tenn. 1968); *Martinolich v. Dean,* 256 F. Supp. 612 (S.D. Miss. 1966); *Strickland v. Burns,* 256 F. Supp. 824 (M.D. Tenn. 1966), all cases applying *Reynolds* to local government.

While population is the starting point and the controlling criterion for decision in apportionment controversies *Reynolds,* supra, mathematical exactness in districting is neither possible nor required. For instance in *Roman v. Sincock,* 377 U.S. 695 (1964) the Supreme Court stated that the proper judicial approach in apportionment cases was to determine whether under the particular circumstances existing, there had been faithful adherence to a plan of population-based representation, with only such minor deviations as might occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

The redistricting order of June 28, 1973, established new precincts having substantial and significant population variances, with one precinct having as much as three times the population of another. See Exhibit A. Such a scheme is patently invalid, and cannot be presumed even to be a good faith attempt to follow the mandate of *Reynolds.* How then, can Appellants claim as a compelling state interest redistricting to affect the one man-one vote rule.

C. Equal Protection—Discrimination on the Basis of Race, Ethnic Origin or Political Affiliation.

The United States Supreme Court has repeatedly held that a state cannot manipulate its political subdivisions so as to defeat a Federally protected right as for example, by realigning political subdivision so as to deny a person his vote because of race, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Sailors v. Kent Board of Education,* supra.

Nor can the restraint imposed by the Constitution on the states be circumvented by local bodies to whom the state delegates authority, *Standard Computing Scale Co. v. Farrell,* 249 U.S. 571, 577 (1919); *Cooper v. Aaron,* 358 U.S. 1, 17 (1958).

In *Gomillion* this court held that a statute passed by the Alabama legislature gerrymandering the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight sided figure" in order to disfranchise a majority of negro voters was unconstitutional as violated of the Fifteenth Amendement.

Denial or dilution of the right to vote on the basis of race has been struck down consistently by the courts, irrespective of the method utilized to bring about such denial of the franchise. See, *e.g., United States v. Mississippi,* 380 U.S. 128 (1965); *Louisiana v. United States,* 380 U.S. 145 (1965) (voter interpretation test invalid); *Andersen v. Martin,* 375 U.S. 399 (1964) (printing of candidates race on the ballot held invalid).

Gerrymandering for purposes of racial discrimination is by itself in violation of the Fourteenth and Fifteenth Amendments to the Constitution, *Sims v. Baggett,* 247

F. Supp. 96, 104 (M.D. Ala. 1965), aff'd sub nom.; *Reynolds v. Sims,* supra. There has been and should be no hesitation in striking down such contrivances when they infringe on protected rights, *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971).

In *Whitcomb* a challenge was made to state statutes establishing Marion County, Indiana, as a multimember district for the election of state representatives on the basis that the law diluted the votes of Negroes and poor persons living in the ghetto area of Marion County. This Court distinguished cases such as *Sims* and *Gomillion* and reversed the Three-Judge Court finding that the statutes were unconstitutional only because:

> "[T]here is no suggestion here that Marion County's multimember district or similar districts throughout the state were conceived or operated as purposeful devices to further racial or economic discrimination."

Undoubted and contrary to Appellants' contentions in their Jurisdictional Statement, such a purposeful motive was present and controlling in the redistricting order on June 28, 1973, by the Harris County Commissioners Court and such purposeful motives are reflected by the deposition testimony of the individual commissioners. See deposition of Commissioner Robert Eckels. Unquestionably the Supreme Court should strike down such a purposeful device to further racial and political discrimination.

The clear and essential purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination, *Loving v. Virginia,* 388 U.S. 1 (1967), and for that reason racial classifications are always constitutionally suspect, subject to the most rigid scrutiny, and bear a far heavier burden of justifica-

tion than other classifications. *Hunter v. Erickson*, 393 U.S. 385 (1969). Only a compelling and permissible state objective, independent of an impossible performance without racial discrimination, will justify such classifications. *Loving*, supra.

Similarly, gerrymandering and other such schemes when effected for the purpose of discrimination on the basis of ethnic origin, religion, wealth, or political affiliation must be held to violate the equal protection clause of the Fourteenth Amendment.

The sworn testimony presented by deposition to this court clearly reflects that (1) a primary and avowed purpose of the Commissioners Court in redistricting was to realign voting districts on the basis of race, ethnic origin and political affiliation and that (2) said redistricting was enacted for the additional purpose of creating "safe" Democratic districts composed of primarily Blacks and Mexican Americans and for the purpose of removing from office the sole elected Republican Justice of the Peace, Appellee Gene Zaboroski. See deposition of Commissioners Tom Bass and Robert Eckels.

As can be graphically seen by Appellee's Exhibit A and the feeble explanations of Appellants, they have not established a compelling state interest to justify their discriminatory actions or reverse the decision of the United States District Court below.

D. Equal Protection—Discrimination Between Members of the Same Class.

The Texas Constitution, Article V, Section 18, and Article V, Section 24, establishes County Commissioners, Justices of the Peace and Constables as county officers.

As county officers, they are members of the same class and Article 2351½ is facially unconstitutional in that it discriminates against members of the same class by treating them differently with no apparent reason or justification.

Paragraph (a) of Article 2351½ involves Commissioners Court changing a Commissioners precinct boundaries during the term of their office and provides the following:

> "It may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective."

However, Paragraph (c) of Article 2351½ fails to require the Commissioners Court to delay the effective date of a change in precinct boundaries or redistricting of a Justice of the Peace Precinct until, "the first day of January following the next general election."

This obvious legislative delegation of different standards or treatment between Commissioners of a Commissioners Court in Paragraph (a), and of Justices of the Peace and Constables in Paragraph (c) of Article 2351½ is an uncontrovertable example of "unequal treatment of persons within the same class."

Additionally, there are a number of other unequal legislative directives to the Commissioners Court contained in Article 2351½ (c) which threat various Justices of the Peace and Constables different even though they are persons of the same class, *i.e.*, county elected officials of a political subdivision of a state. These are:

1. Allows some elected Justices of the Peace and Constables to remain in office and arbitrarily removes all other elected Justices of the Peace and Constables by declaring their offices vacant.

2. Allows appointment of new Justices of the Peace to vacant offices of the deposed elected Justices of the Peace or Constables without the right of the voters to elect them.

3. It provides for removal for reasons other than the sole constitutional grounds set forth in Article V, Section 24, Constitution of the State of Texas; this contravenes both the Texas Constitution prohibitions as well as the due process right against summary removal, or removal without cause, contained in the Fourteenth Amendment of the United States Constitution.

It is quite obvious that the equal protection clause, which prohibits arbitrary and invidious discrimination between citizens of the same class has been contravened by the legislative attempt to circumvent both the expressed mandate of Article V, Section 18 and 24 and the prohibitions embodied in the equal protection clause itself by the arbitrary treatment of Justices of the Peace and Constables and County Commissioners within this same county.

Additionally, Article 2351½ (c) is facially unconstitutional because of its legislative attempt to provide summary discharge of an elected official before the expiration of his constitutionally guaranteed term of office at the whim of the County Commisisoners while maintaining other similarly elected officials in office. With reference to this whimsical approach to redistricting Appellee cites

the transcript of the proceedings on January 30, 1974 wherein Judge Singleton of the Three-Judge District Court asked counsel for Appellants, "Can you think of any other incident in the entire spectrum of our government where any elected post is given that type of unlimited discretion over another elected official? Can you think of any area in our entire system of government where one body is given the unlimited discretionary power to remove from office another elected official?" Wherein Mr. Landry responded, "No, Your Honor, I cannot." (Transcript at 71-72)

The irreconcilable conflict between constitutional provisions Article V., Section 18 and Article V., Section 24 of the Texas Constitution, and Article 2351½ (c) Texas Civil Statutes is apparent on its face and is sufficient grounds for this Court to affirm the judgment of the Three-Judge District Court below.

III.

As additional support of Appellee's Motion to Dismiss or Affirm the Court's attention is directed to Exhibit B, which is an opinion of the Attorney General of the State of Texas. In Tex. Atty. Gen. Op. No. H-220, January 29, 1974 the Attorney General impliedly overrules the 1962 and 1967 Attorney General Opinions relied upon by Appellants. (J.S. at 14, 15)

This opinion, which is only advisory, goes to the essence of the question presented by this appeal and lays bear the unsound principles upon which the Harris County Commissioners Court redistricted and removed only elected officials from office.

CONCLUSION

Based upon the ruling and opinion of the Three-Judge District Court holding that there was no compelling state interest to justify the actions of the Commissioners Court and the feeble state interest set out in Appellants' Jurisdictional Statement, Appellee respectfully submits this Honorable Court should dismiss the appeal herein on the grounds that it has no jurisdiction or in the alternative accept jurisdiction and affirm the judgment of the United States District Court for the Southern District of Texas.

Respectfully submitted,

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
Attorneys for Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

By_____
C. ANTHONY FRILOUX, JR.

By_____
GERALD A. WOOLF

CERTIFICATE OF SERVICE

(1) The undersigned counsel for the Appellee Gene Zaboroski do hereby certify that on this_____day of April, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' Attorneys and other Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Motion to Dismiss or Affirm".

JOE RESWEBER
County Attorney
202 Harris County
Courthouse
Houston, Texas 77002

EDWARD J. LANDRY
Senior Assistant County
Attorney
202 Harris County
Courthouse
Houston, Texas 77002

MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County
Courthouse
Houston, Texas 77002

WESLEY H. HOCKER
Attorney In Charge
For Intervenor-Petitioners
Harris County Democratic
Executive Committee
1020 Houston First Savings
Bldg.
711 Fannin Street
Houston, Texas 77002

VIRGIL H. BARFIELD
Attorney In Charge
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center
Building
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center
Building
Houston, Texas 77002

DAVID HOLLINGS-
WORTH
Of Counsel
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center
Building
Houston, Texas 77002

JOHN M. O'QUINN
Attorney In Charge
For Intervenor-Petitioners
500 Houston First Savings
Building
711 Fannin Street
Houston, Texas 77002

LARRY B. KERFOOT
Attorney In Charge
For Plaintiff,
Blackie Neeley
910 Houston Bar Center
Building
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
Attorneys for Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

By_____
C. ANTHONY FRILOUX, JR.

By_____
GERALD A. WOOLF

EXHIBIT A

	Voters in New Precincts	Difference in Largest Precinct as to Smallest Precinct	% Larger Precinct to Smaller Precinct
1.	343,765	197,865	135.0%
2.	145,960		
3.	169,959	23,999	16.0%
4.	175,769	29,809	20.4%
5.	337,844	191,884	131.4%
6.	179,977	34,011	23.0%
7.	238,401	92,411	63.3%
8.	149,863	3,903	2.6%

EXHIBIT B

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711

John L. Hill
Attorney General

January 29, 1974

Opinion No. H-220

Re: Must all Justices of the Peace and Constables run at the next general election when prior to that election all the justice precinct boundary lines are changed and the precincts are renumbered.

The Honorable Ned Granger
County Attorney
County of Travis
Austin, Texas

Dear Mr. Granger:

You have advised us that the Commissioners Court of Travis County, on July 9, 1973, passed an order, effective January 1, 1974, redistricting the six justice precincts and changing the boundaries of each of them. On December 10, 1973, the Commissioners Court changed the boundaries of each of the constables precincts to conform to the justice precincts, these changes likewise to be effective as of January 1, 1974. You have not advised us of the residence of the justices or of the terms of office of each justice or constable.

Your question is whether the offices of the justices of the peace and of the constables are vacant as of January 1, 1974.

Section 18 of Article 5 of the Constitution of Texas provides, in part:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, *each of whom shall hold his office for four years and until his successor shall be elected and qualified.* . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, *who shall hold his office for four years* and until his successor shall be elected and qualified. . . ." (emphasis added)

Article 5, Sec. 24 provides:

> "County Judges, county attorneys, clerks of the District and County Courts, *justices of the peace, constables,* and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury." (emphasis added)

In *Childress County v. Sachse,* 310 S.W.2d 414 (Tex. Civ. App., Amarillo, 1958) Sachse had been elected commissioner of Childress County, commencing January 1, 1955. The Commissioners Court changed the precinct boundary lines effective April 1, 1955 and the County Judge declared Sachse's office vacant, since he did not reside in the newly described precinct. In affirming the district court order awarding Sachse back salary, the Court of Civil Appeals quoted from 20 C.J.S., Counties, Sec. 77, p. 840 as follows:

> "While a change of boundary lines of commissioner districts, or a redistricting, does not deprive a county commissioner of the right to hold office for the rest of his term, although by reason of the change his residence is without the district from which he was elected, provided it is still within the county, still he does not by becoming a resident of another district, become entitled to succeed the official in that district after the expiration of his term."

The Court held that Sachse never was legally removed from office and his office was never legally vacated or abolished. He had a constitutional and legal right to serve as commissioner of the precinct until his term expired by law. The Supreme Court, in refusing the application for writ of error, at 312 S.W.2d 380 (Tex. 1958) stated as its per curiam opinion:

> "The application for writ of error is refused. No reversible error. We approve the holding of the Court of Civil Appeals that changes in precinct boundaries do not create a vacancy in the office of County Commissioner or deprive the incumbent of the right to hold office for the remainder of his term, even though by reason of such changes his residence is not within the precinct as redefined. 310 S.W.2d 414."

This office, nevertheless, issued opinions holding that the *Sachse* case did not apply and that justice precincts were abolished and vacated upon redistricting. See for instance, Attorney General Opinion WW-536 (1958); Attorney General Opinion C-112 (1963). And compare Attorney General Opinion V-1032 (1950) and Attorney General Opinion V-1218 (1951).

However, in 1970 the Court of Civil Appeals at Dallas had before it the case of *McGuire v. Hughes*, 452 S.W.2d 29 (Tex.Civ.App., 1970, no writ). The question there was whether abolition by the commissioners court of one of two justices of the peace within a precinct had the legal

effect of reducing four year term of one of the justices to two years. The Court, in answering the question said:

> ". . . The constitutional provision is clear and unambiguous that following the first two-year term of the uneven numbered office (as was Place No. 1) thereafter, all justices of the peace would be elected for the term provided for in the Constitution, namely, four years. We hold that under such constitutional mandate the term of office to which Relator McGuire was elected in 1968 was for a period of four years, ending December 31, 1972.
>
> "It has been declared in many cases that a public office is property. . . . This is certainly true in the sense that a person elected to an office established by law, and duly qualified for same by taking the oath of office, has a property right to the possession of the office and enjoyments of its rights and emoluments all of which the Constitution protects and the courts will enforce. . . . Judge McGuire was duly and legally placed into possession of his office in 1968 for a constitutional term of four years. During that period he has the vested right and privilege to exercise the official duties of the office and to receive the compensation provided by law. Such may not be denied him by administrative edict or as a result of the Commissioners Court's action in abolishing another office in the same precinct. To sanction such would open wide a Pandora's Box of uncertainty and confusion." (452 S.W.2d at 31-32) See also *Villarreal v. Bustamante,* 480 S.W.2d 231 (Tex.Civ.App., San Antonio, 1972, no writ); Attorney General Opinion H-97 (1973).

It is our opinion therefore that justices of the peace and constables elected to a full term (as opposed to being elected to fill an unexpired term) are entitled to serve the full four years in office and that a redistricting of their precincts by the commissioners court does not vacate

their office. In this opinion we do not consider the effect of a court-ordered reapportionment.

The conclusion of this opinion is distinguishable from the situation considered in Attorney General Opinion H-219 (1974) relating to State Board of Education districts. There terms were cut short pursuant to a statutory scheme ending all State Board terms at the general election immediately following a decennial reapportionment.

SUMMARY

Justices of the peace and constables, elected to a full term, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice or constable not living in his precinct, does not vacate his office.

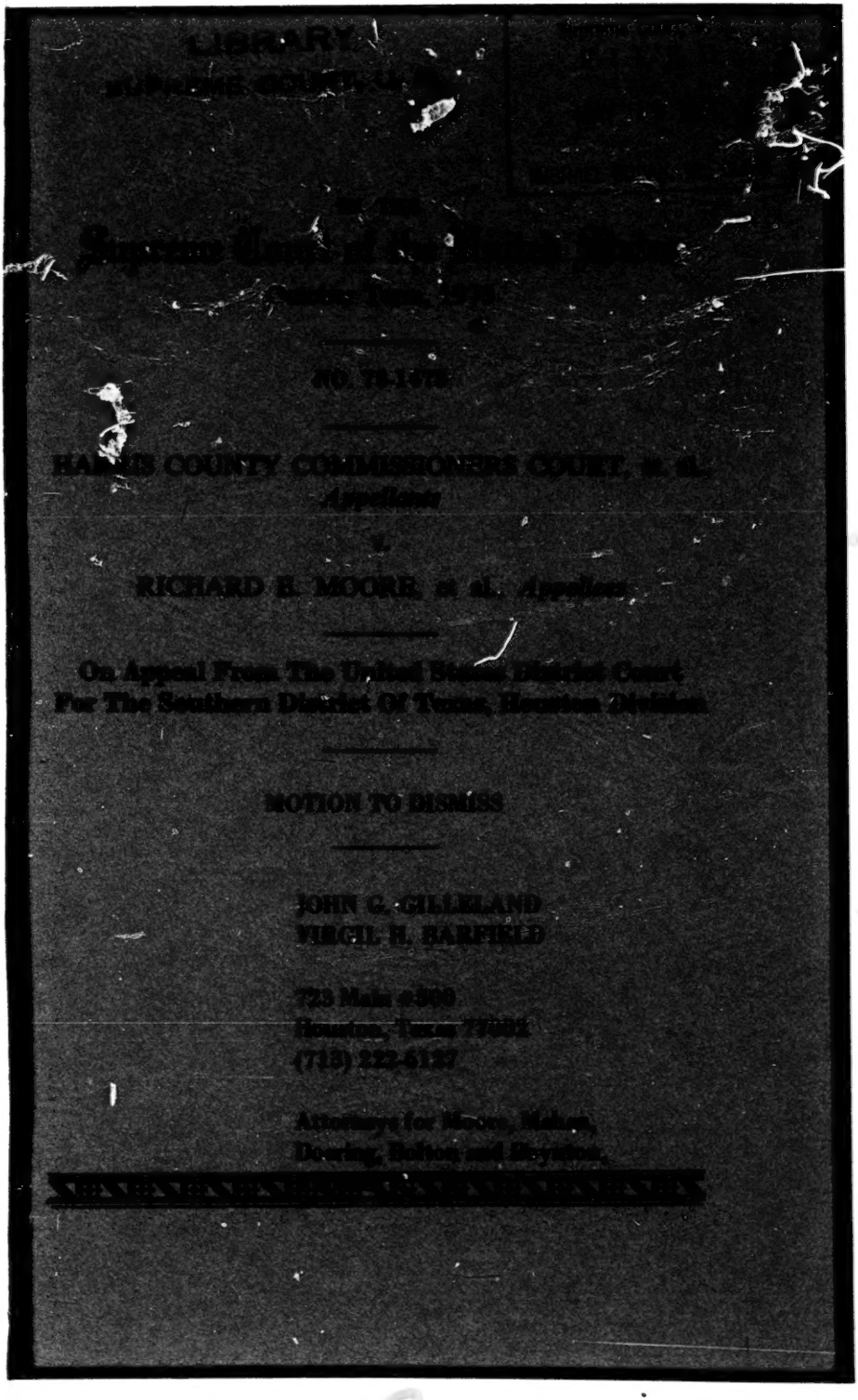
Yours very truly,

JOHN L. HILL
John L. Hill
Attorney-General of Texas

APPROVED:

/s/ LARRY F. YORK, First Assistant

/s/ DAVID M. KENDALL, Chairman
Opinion Committee



LIBRARY

Supreme Court, U.S.

NO. 78-1572

HARRIS COUNTY COMMISSIONERS COURT, et al.
Appellants

v.

RICHARD B. MOORE, et al., *Appellees*

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division

MOTION TO DISMISS

JOHN C. GILLELAND
VIRGIL H. BARFIELD

723 Main #500
Houston, Texas 77002
(713) 222-6127

Attorneys for Messrs. Makan,
Doering, Bolton and Boynton.

INDEX
and
TABLE OF CITATIONS

	Page
Motion to Dismiss the Appeal	1
Order and Opinion Below	2
Questions Presented	2
State Constitutional and Statutory Provisions involved	3
Statement	3
The Questions on Appeal have Previously Been Answered by the Court	7
A. The Equal Protection Guarantee of the Fourteenth Amendment was Violated by Vacating the Offices in Question upon a Mere Convenience Redistricting pursuant to Article 2351½(c)	7
(1). Malapportioned Precincts after Redistring	7
(2). The Law is Applied Differently to Members of the Same Class	9
B. The Rights of the Electorate as Guaranteed by the Fifteenth Amendment are Violated when an Elected Official, for Whom they Voted or for Whom They had a Right to Vote, is removed from Office Prior to the Expiration of His Term of Office	12
No Adequate Remedy Exists for Appellees under Texas Laws	14
No Compelling State Interests Were Shown by Redistricting Pursuant to Article 2351½(c)	18
Conclusion	19

Page

Certificate of Service 20

Appendix 22

TABLE OF CITATIONS

Cases

Avery v. Midland County, Texas, 88 S.Ct. 1114 . . . . . 3,7,8 & 9

Brown v. Meeks, 96 S.W.2d 839 16

Childress County v. L.A. Sachse, 312 S.W.2d 380 13

C.R. Davis v. Steven C. Oaks, et., al., Texas Supreme Court, B-4542- (April 1974) not yet reported - 17

Dyer v. Love, 307 F.Supp. 974 12

Gray v. Sanders, 83 S.Ct. 801 7

Hastings v. Townsend, 136 S.W. 1143 16

Massachussetts v. Burkhart, 207 F.Supp. 885, 893 7

Mayor of Savannah v. Savannah Distributing Company, Inc., 43 S.W. 1101 10

McGuire v. Hughes, 452 S.W.2d 29 17

Meredith v. Sharp, 256 S.W.2d 870 16

Powell v. McCormack, 89 S.Ct. 1944 . . . . . 13 & 14

State Ex Relator Dowlen v. Rigsby, 43 S.W. 271, 43 S.W. 1101 . . . . . 14,16 & 17

State v. Erickson, 282 N.W. 728 10

Williams v. Castleman, 247 S.W. 263 . . . . . 15,16 & 17

CONSTITUTIONAL AND STATUTORY PROVISIONS AND MISCELLANEOUS

28 U.S.C.A. 2201. 3

28 U.S.C.A. 2281. . . . . 3 & 6

42 U.S.C.A. 1983. 3

42 U.S.C.A. 1985 (3) 3

Article 5, Section 8, Vern. Ann. Tex. Const. . . . . .

Page

Article 5, Section 18, Vern. Ann. Tex. Const. . . . 4 & 15
Article 5, Section 24, Vern. Ann. Tex. Const. 9,10,12 & 13
Article 16, Section 14, Vern. Ann. Tex. Const. . . 9 & 10
Article 2351½, Vern. Ann. Tex. Civ. Stat. 3,5,6,7,11,
. . . . . .12,13,16,17 & 18
Tex. Atty. Gen. Op. No. H-220 (1974) . . . . . 16 & 17

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, et. al., *Appellants*

v.

RICHARD E. MOORE, et al., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

MOTION TO DISMISS THE APPEAL

Appellants have appealed from the judgment of a Three-Judge United States District Court for the Southern District of Texas, Houston Division, entered on January 30, 1974, declaring the Texas Statute, Article 2351½, Vernon's Annotated Texas Civil Statutes, to be facially unconstitutional, and permanently enjoining an order passed by the Harris County Commissioners Court which redistricted the County's eight justice of the peace and constable precincts declaring a vacancy in some of the offices of justice of the peace and constable thereby removing elected officials from office prior to the expiration of their terms of office.

This statement is submitted by Appellees, Moore, Bolton, Mahan, Doering and Boynton, pursuant to Rule 16, Section 1,

Paragraph D of the Supreme Court Rules, contending that the questions raised by Appellants in their Jurisdictional Statement have been previously answered by the Supreme Court and their appeal should therefore be dismissed.

ORDER AND OPINION BELOW

A copy of the judgment order issued January 30, 1974, of the Three-Judge United States District Court, for the Southern District of Texas, Houston Division, is appended hereto and marked Exhibit A. A copy of the written opinion of the Court, filed February 8, 1974, is appended hereto and marked Exhibit B.

QUESTIONS PRESENTED

Where a state stuatue permits a voluntary redistricting of the elective state constitutional offices of justice of the peace and constable, and when applied, the statutes effect is to remove some elected officials from office prior to the expiration of their terms of office, while permitting other elected officials of the same class to remain in office:

A.

When the statute is applied, under the circumstances existing herein, is the equal protection guarantee of the Fourteenth Amendment offended?

B.

When an elected official is removed from office, without cause, prior to the expiration of his term of office by virtue of a

redistricting order issued pursuant to provisions of a state statute, does said removal offend the rights of the electorate as guaranteed by the Fifteenth Amendment?

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 5, Section 18 and 24; Article 16, Section 14 of Vernon's Annotated Texas Constitution; Article 2351½ of Vernon's Annotated Texas Civil Statutes.

STATEMENT

This suit was brought by Appellees, under 28 U.S.C.A. 1343, 2201 and 2281; and 42 U.S.C.A. 1983 and 1985 (3), seeking to have declared unconstitutional a Texas Statute, viz., Article 2351½ (c), and to have set aside an order of the Appellants, the Harris County Commissioners Court, redistricting the eight justice of the peace and constable precincts, pursuant to the authority granted by Article 2351½ (c), see stipulations of evidence; which order, by reason of the effect of Article 2351½ (c), vacated the offices of five Appellees, all of whom had been previously elected, three of whom were justices of the peace and two of whom were constables, and all had at least one and one-half (1½) years before their terms of office expired. One Appellee, John Boynton, joined in the suit, as a representative of the class of citizens whose legal rights had allegedly been violated by the order of the Appellants on June 28, 1973.

The Appellants, the Harris County Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties of a commissioners court under Texas law were reviewed at length in Avery v. Midland County, Texas, 88 S.Ct. 1114. One of their duties is to redistrict the justice of the peace and constable precincts "from time to

to time, for the convenience of the people". This authority is set out in Article 5, Section 18, of the Texas Constitution. See Exhibit C.

On January 12, 1973, the Appellants appointed a nine member committee to study and recommend to them new boundaries for the eight justice of the peace and constable precincts of the County. After several public meetings, various plans were considered and submitted to Appellants for consideration. On June 28, 1973, Appellants disregarded all plans submitted by the redistricting committee and adopted a plan submitted by Mr. Tom Bass, one of the Appellants herein. The "Bass" plan, as it became known, was adopted by Appellants and placed into effect three days after its adoption.

The stated purposes for redistricting the justice of the peace and constable precincts were to eliminate the gross population disparities existing between such precincts; to make the offices more convenient to all of the people of the County; and to draw new precinct boundaries along ethnic or racial lines so as to promote minority election to the offices of justice of the peace and constable in the future. The main consideraiton as contended by Appellants for redistricting was that the gross population disparity of the various precincts created a compelling state interest to bring about redistricting of the said justice of the peace and constable precincts.

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage com-

parison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are shown in Exhibit F.

By virtue of Appellants' order of June 28, 1973, the new justice of the peace and constable Precinct 4 was established encompassing all of the old Precincts 4, 5 and 7, and portions of the old Precincts 1, 3 and 5. See Exhibits D and E for the geographical outlines of the eight precincts before and after redistricting.

Article 2351½ (c) was passed by the Legislature of Texas in 1965, and it provides as follows:

> "When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant." See Exhibit G.

Inasmuch that following redistricting, four justices of the peace and three constables of former precincts resided in new Precinct 4, all offices of the four justices of the peace and the three constables were declared vacant pursuant to the provisions

of Article 2351½(c). Afterwards, Appellants filled the vacancies in new Precinct 4 with one former justice of the peace and the other justice of the peace vacancy was filled by appointing a person of Appellants' choice who had never been elected to the office of justice of the peace. The constable vacancy in new Precinct 4 was filled by the appointment of one of the three former constables.

In its order issued January 30, 1974, the Three Judge District Court declared as follows:

"1. The Court has jurisdiction under Title 28, U.S.C.A. Section 2281.

2. The Texas statute, Article 2351½, Vernon's Annotated Texas Civil Statutes, is facially unconstitutional.

3. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined." See Exhibit A.

In its opinion issued February 8, 1974, the Court made the following findings:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected justice of the peace or constable upon the circumstance that a convenience redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so effected."

and,

"That the effect of such statute in cutting short the terms of such officers constitutes an impermissable abridgement of the franchise of those voters who had voted for them or who had been entitled to vote for them."

In addition, the Court, after hearing all the evidence, stipulations and arguments of Counsel, found that no compelling state interest is served to justify such effects of the statute.

THE QUESTIONS ON APPEAL HAVE PREVIOUSLY BEEN ANSWERED BY THE COURT

A. The equal protection guarantee of the Fourteenth Amendment was violated by vacating the offices in question upon a mere convenience redistricting pursuant to Article 2351½(c).

(1)
MALAPPORTIONED PRECINCTS AFTER REDISTRICTING

The right to have one's vote count as equal to that of another is a basic constitutional principle. Gray v. Sanders, 83 S.Ct. 801; Massachusetts v. Burkhart, 207 F.Supp. 885,893.

In Avery v. Midland County, Texas, supra, the Court applied the principles that apply in this instance, to-wit:

A. That a state's political subdivision must comply with the Fourteenth Amendment.

B. The Fourteenth Amendment forbids election of local govermental officials from districts of disparate population.

C. The Equal Protection Clause reaches exercise of state

power however manifested, whether exercised directly or through subdivision of the state.

D. City, town or county may no more deny equal protection of the law than it may abridge freedom of speech, establish official religion, arrest without probable cause, or deny due process of law.

E. When state delegates law making power to local government and provides for election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have right to equally effective voice in election process.

F. Equal Protection Clause does not require that the state never distinguish between citizens, but only that distinctions that are made not be arbitrary or invidious.

In viewing Exhibit F, it is readily seen that the requirements of the Avery case, supra, have not been met. It is clearly shown therein that after the redistricting of June 28, 1973, new Precincts 1 and 5 had more than twice the number of residents of new Precincts 2 and 8. A vote cast by a citizen in either Precinct 2 or 8 for a justice of the peace or constable would count two and one-thirds (2 1/3) times more than a vote cast by a citizen in new Precincts 1 and 5 for the same offices.

Applying the test of "convenience of the people" to the redistricting of June 28, 1973, it certainly would not be as convenient for a resident of the new Precinct 4 which contains in excess of 593 square miles inside its boundaries as it would be for a resident of the new Precinct 6 which contains only 32 square miles inside its boundaries. See Exhibit F.

While the Court was concerned with the mandatory redistrict-

ing of units of local government with general governmental powers in the Avery case, supra, their holdings equally apply to units of local government with non general governmental powers when a voluntary redistricting is undertaken pursuant to a state statute.

A failure to apply the rights as guaranteed by the Equal Protection Clause pursuant to the holdings by the Court in the Avery case, supra, when voluntarily redistricting units of local government with no general governmental powers, resulting in grossly malapportioned precincts for justices of the peace and constables, who are paid from the general treasury of the county, then such redistricting scheme arbitrarily, invidiously and irrationally discriminates between a citizen of one precinct and a citizen of another precinct whose vote is 2 1/3 times greater.

(2)
THE LAW IS APPLIED DIFFERENTLY TO MEMBERS OF THE SAME CLASS.

Article 5, Section 24, of the Texas Constitution provides as follows:

Section 24. Removal of County Officers.

> Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetentcy, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Article 16, Section 14, of the Texas Constitution contains the

following provisions:

Section 14. Civil Officers; Residence; Location of Offices.

> Sec. 14. All civil officers shall reside within the state; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

By viewing Article 5, Section 24, of the Texas Constitution, it is readily seen that the Constitution has classified various elected officials as county officers, including justice of the peace and constables.

Article 16, Section 14, of the Texas Constitution further enumerates such classification of elective officials in Texas as either civil officers with statewide jurisdiction, district officers with district jurisdiction comprised of one or more counties and county officers, whose jurisdiction extends only within the boundaries of the county.

The authorities approving legislative or constitutional classification are so universally established that no citations are given herein. However, the criterion established for class legislation is fairly stated in State v. Erickson, 225 Iowa 1261, 282 N.W. 728. The test as to meeting the requirements of due process being whether the law operates equally upon all who come within the class so effected, embracing all persons who are or may be in like situations or circumstances and; the Constitution is offended where a public law is applied differently to different persons under the same or similar circumstances. Mayor of Savannah v. Savannah Distributing Co., Inc., 43 S.E. 2d 704.

To fulfill the requirements of due process, the law must be applied so that it operates equally upon all who come within the class so effected. By viewing Article 2351½(c), see Exhibit G; it is obvious that this statute fails to meet the test of due process when applied to legislative classification.

This case is a simplified example of Article 2351½(c) failing to meet the requirements of due process, to-wit:

The Appellees justices of the peace and constables were removed from office by the application of Article 2351½(c) simply because of where they resided after redistricting; while the justices of the peace and constables in old and new Precincts 1, 2, 3 and 8 remained in office simply because of where they resided after redistricting.

In addition to Article 2351½(c) failing to meet the test for due process for the reasons set out in the preceding paragraphs, the test of due process is not met when comparing Article 2351½(c) with Article 2351½(b). The latter guarantees the continuation in office of a county commissioner, who is also a county officer, when the commissioner precincts are redistricted even though he no longer resides in the precinct from which he was elected. While Article 2351½(c) provides for the removal of justices of the peace and constables, who are classed as county officers, when redistricting occurs and he no longer lives in the precinct from which he was elected. Thus, again, the law fails to be applied evenly to members of the same class.

Article 2351½, therefore, invidiously and irrationally discriminates against one elected official upon the circumstance that a mere convenience redistricting places him in a district with others thereby removing him from office, while others, of the same class are not so effected, and the due process clause of the Fourteenth Amendment is violated thereby.

B. The rights of the electorate as guaranteed by the Fifteenth Amendment are violated when an elected official, for whom they voted or for whom they had a right to vote, is removed from office without cause, prior to the expiration of the term of office of the elected official.

In Dyer v. Love, 307 F. Supp. 974, the Court restated the fundamental concept of the right to vote:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Even in the limited instances where the right to vote has not yet been specifically recognized as being constitutionally required, as for certain state and local offices, the right to equal protection exists. This is, when a right to vote for a certain state or local official has been conferred by the state laws, that right must not be conferred in an arbitrary or invidiously discriminatory manner.

The Fifteenth Amendment specifically prohibits the abridgement of the vote. Thus the electorate's vote is abridged when the term of office of an elected official is cut short, without cause, upon the circumstance that a mere convenience redistricting places him in districts with others. This abridgement as authorized by Article 2351½(c) invidiously and irrationally discriminates between the effect of the voter who voted or was entitled to vote in the elected official's election and voters whose franchise was not so bobbed.

Article 5, Section 24, of the Texas Constitution, supra, provides for the removal of a county officer from office prior to the

expiration of his term of office. The Supreme Court of Texas in Childress County v. L.A. Sachse, 312 S.W.2d 380, interprets Article 5, Section 24, of the Texas Constitution. Among other things, the Court held as follows:

A. Where the State Constitution prescribes the manner of removing a county officer from office, neither the legislature, executive officers or the judiciary can act beyond the limitations of the Constitution. Vernon's Ann.St.Const., Art. 5, Sec. 24.

B. Exclusive jurisdiction to remove a county officer from office or to declare a vacancy in such office was vested by the Constitution in the District Court; and County Commissioners Court has no authority to determine right of one to a county office, remove him from such office or declare a vacancy therein. Vernon's Ann.St. Const., Art. 5, Sec. 24."

Thus, Article 5, Section 24, provides the only method of removing an elected county officer from office prior to the expiration of his term of office. Article 2351½, passed subsequent to the Childress County case, supra, attempts to remove an elected county officer from office by a convenience redistricting without following the law of the State, thereby abridging the vote of the electorate who voted or who could have voted for the county officer who is wrongfully removed from office prior to the expiration of his term of office, pursuant to the provisions of Article 2351½.

In Powell v. McCormack, 89 S.Ct. 1944 (1969), the United States Congress sought to exclude Powell, who had been duly elected from the 18th Congressional District of New York, from the 90th Congress. Congress sought exclusion by resolution and

prevented Powell's seating. No action was taken against Powell pursuant to constitutional provisions of impeachment. In concluding the case in Powell's favor, the Supreme Court said:

> "That since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership."

The essence of this ruling is that the Constitution determines who is qualified for membership to Congress as well as how he can be removed or excluded prior to the expiration of his term of office. If the Constitution is not followed in removing said Congressman, the effect is to abridge the vote of the electorate who elected him to office.

The ruling in the Powell case, supra, is analogous to the Texas law for removing an elected county officer from office prior to the expiration of his term of office. Removing a county officer from office prior to the expiration of his elective term, without cause, abridges the votes of the electorate who voted or who could have voted for such county officer in violation of the rights guaranteed by the Fifteenth Amendment.

NO ADEQUATE REMEDY EXISTS FOR APPELLEES UNDER TEXAS LAW

In State v. Rigsby, 43 S.W. 271 (Tex.Civ.App. 1897), twenty-one (21) years after the adoption of the present Texas Constitution, of which the Texas Supreme Court in a memorandum decision at 43 S.W. 1101 (1897), adopted the decision of the Court of Civil Appeals as the law of the state in the matter described therein. In the Rigsby case, supra, Rigsby, a justice of

the peace, sought reinstatement to office after being ousted from office because of realignment of the boundaries by the commissioners court. The Court in denying relief to the ousted elected official Rigsby, declared:

". . .the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. This is no anomaly in our law. All county officers whose compensation is derived from perquisites, and therefore depends to some extent on the territory in which they exercise their functions, hold their offices subject to lawful power to alter that territory. While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action. Mechem,Pub. Off. Sec. 855."

In the subsequent case of Williams v. Castleman, 247 S.W. 263 (Tex.Sup.Ct.1922), the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

". . .The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time,' which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.

"It is thus seen that there is no limitation on the time when the commissioners' court may divide a county into justice precincts, and that, aside from the maximum and minimum

prescribed in the Constitution does not state how the power of division by the commissioners' court shall be exercised, nor does the statute.*** It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."

The holdings of State ex rel. Dowlen v. Rigsby, supra, and Williams v. Castleman, supra, have been unanimously adhered to by the Texas courts in the following cases: Hastings v. Townsend, 136 S.W. 1143 (Tex.Civ.App. 1911, no writ history); Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1936, error dismissed); Meredith v. Sharp, 256 S.W.2d 870 (Tex.Civ.App. 1953, error refused, n.r.e.).

The 1965 enactment of Article 2351½(c) by the Texas legislature did not abolish the law as established in Rigsby, supra, and Castleman, supra, but rather narrowed the holdings of the cases. The provisions of the case law and Article 2351(c) both permit the removal of an elected official from office prior to the expiration of his term of office.

On January 29, 1974, the Attorney General of Texas in an advisory opinion, No. H-220, declared the Texas law to be as follows:

"Justices of the peace and constables, elected to a full four (4) year term of office, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice of the peace or constable not living in the precinct from which he was elected, does not vacate his office."

In 1970, in McGuire v. Hughes, 452 S.W.2d 29 (Tex.Civ.App.) (1970, no writ), the Court declared that:

> "Judge McGuire, a justice of the peace, was duly elected to his term of office and placed in office for a four year term beginning January 1, 1969. During that period, he has the vested right and privilege to exercise the official duties of the office and to receive the compensation so provided by law. Such may not be denied him by administrative edict of the commissioners court in abolishing another office in the same precinct."

To test the good faith of the Texas Courts to determine whether or not the courts would consider a challenge to Article 2351½(c), Mr. C. R. Davis, a constable who had been elected in the 1972 General Elections for a full four year term, in old Precinct 4 of Harris County, Texas, and whose office was declared vacant on June 28, 1973, by Appellants' order complained of herein and who is not an Appellee herein, filed suit in the Supreme Court of Texas on March 28, 1974, in the nature of a writ of mandamus as provided by the law of Texas. In the petition for such writ, a direct challenge of Article 2351½(c) was made and the laws as declared by the Attorney General's Opinion No. H-220, supra, and McGuire v. Hughes, supra, was sought to be either affirmed or denied.

On April 10, 1974, the Supreme Court of Texas, in Cause No. B-4542, styled C. R. Davis v. Steven C. Oaks, et. al., not yet reported, refused to hear said mandamus and in essence refused any challenge of Article 2351½(c).

In light of the decisions of the Supreme Court of Texas in State v. Rigsby, supra; Williams v. Castleman, supra; and C.R. Davis v. Steven C. Oaks, et. al., supra, no adequate remedy ex-

ists under Texas law to resolve the issues that were resolved in Appellees favor on January 30, 1974, by the Three Judge District Court in its Order. See Exhibit A.

NO COMPELLING STATE INTEREST WAS SERVED BY REDISTRICTING PURSUANT TO ARTICLE 2351½(c)

The only theory of compelling state interest offered by Appellants to the Three Judge District Court to justify the effects of Article 2351½(c), thereby abrogating those rights as guaranteed by the Fourteenth and Fifteenth Amendments, was the fact that the population had grown disproportionate over some ninety-six years since the boundaries of the old precincts were established.

But by viewing Exhibit F, the order of Appellants of June 28, 1973, did not resolve the problem of disproportionment in the justice precincts, but only made such disproportionment less severe. Had Appellants sought to make each new justice precinct conform to the one man-one vote principle and had there been a closer conformity in the precincts in area, then they could in good faith make a contention of compelling state interest.

The Three Judge Court, which heard the evidence of all parties, heard the arguments of all counsel therefor, was in the position to best judge whether Appellants' contentions justified the denial of the rights as guaranteed by the Fourteenth and Fifteenth Amendments.

The Court concluded, after all parties had been given the opportunity to be heard, as follows:

". . .insofar as Article 2351½ operated to end the term of a duly elected official upon the circumstance of a mere con-

venience redistricting, it invidiously and irrationally discriminates against the official and the electorate who voted for him or were entitled to vote for him and voters whose franchise was not so bobbed."

The Court further held:

"The new districts were clearly not drawn with population equality in mind; nor would population equalization, if seen as a compelling reason for redistricting, bear any necessary relation to vacating these offices, a different consideration entirely."

CONCLUSION

It is submitted that the questions presented by Appellants' appeal have previously been answered by the Court and no necessity exists to hear said appeal; that this appeal in all things should be dismissed.

Respectfully submitted,

JOHN G. GILLELAND

VIRGIL H. BARFIELD

ATTORNEYS FOR APPELLEES

500 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
222-6127 or 225-9257

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellees do hereby certify that on this the 9th day of May, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' and Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Motion To Dismiss The Appeal".

Joe Resweber
County Attorney
Harris County, Texas
For Appellants, Harris County Commissioners Court
Houston, Texas 77002

Edward J. Landry
Senior Assistant County Attorney
For Appellants, Harris County Commissioners Court
202 Harris County Courthouse
Houston, Texas 77002

Michael R. Davis
Assistant County Attorney
For Appellants, Harris County Commissioners Court
202 Harris County Courthouse
Houston, Texas 77002

C. Anthony Friloux, Jr.
Attorney in Charge
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

Gerald A. Woolf
Of Counsel
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

Larry B. Kerfoot
Attorney in Charge
For Plaintiff Blackie Neeley
910 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002

John M. O.Quinn
Attorney in Charge
For Intervenor-Petitioners
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

Wesley H. Hocker
Attonrey in Charge
For Intervenor-Petitioners
Harris County Democratic
Executive Committee
1020 Houston First Savings
Bldg.
711 Fannin Street
Houston, Texas 77002

All parties required to be served have been served.

Signed:

JOHN G. GILLELAND

VIRGIL H. BARFIELD

ATTORNEYS FOR APPELLEES

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A —Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit D — Precinct Map before dedistricting

Exhibit E — Precinct Map after redistricting

Exhibit F — Population and Area Comparison Before and After Redistricting

Exhibit G — Article 2351½, Vernon's Annotated Texas Civil Statutes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos, 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and a a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V, Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S. C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

> (c) When boundaries of justice of the peace precincts are cnanged, so that existing precincts are

1. Tex. Const. Art. 5, §18.

> altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices. These offices are the creation of state law; the jurisdiction

of the offices in question is statewide,[2] and the statute attacked is of statewide effect and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

---

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commisisoners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

EXHIBIT D

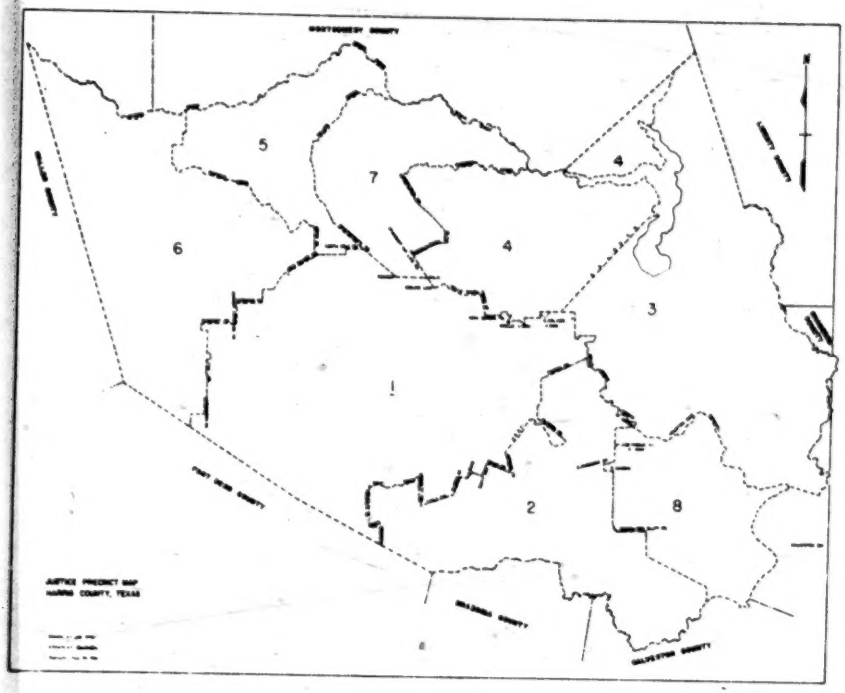


EXHIBIT E

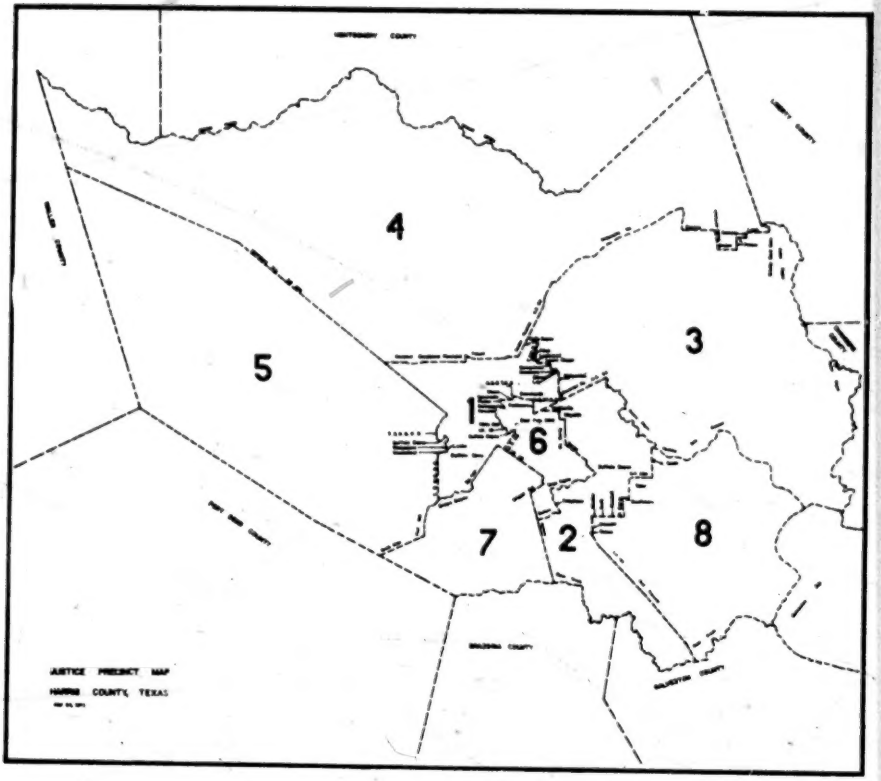


EXHIBIT F

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are as follows:

PCT. NO.	POPULATION BEFORE	POPULATION AFTER	POPULATION DIFFERENCE AFTER	POPULATION PERCENTAGE COMPARISON AFTER	AREA IN SQUARE MILES AFTER	AREA PERCENTAGE COMPARISON AFTER
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	BASE NUMBER	BASE NUMBER	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

*The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

*The total number of square miles in Harris County, Texas is 1750.

EXHIBIT G

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commisisoners precincts are changed, the terms of office of the commisisoners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that

precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

Supreme Court, U. S.
FILED
MAY 22 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151
Attorneys for Appellants

Date: May 22, 1974

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
ARGUMENT AND AUTHORITIES	1
1. Subparagraph (g) of Rule 15, Supreme Court Rules, is not applicable to this appeal, and even if it were, Appellants' Jurisdictional Statement is nevertheless in full compliance therewith	1
2. The Order of the Commissioners Court redistricting the County's eight justice precincts in no way abridged any citizen's right to vote	2
3. Appellees lack standing to urge any invalidity of the redistricting in question on the basis that it allegedly fails to comport with the "one man-one vote" principle	5
4. The different treatment accorded by Article 2351½ to county commissioners on the one hand and justices of the peace on the other is not a legislative distinction that is either arbitrary or invidious	9
5. Appellees' claim of gerrymandering for purposes of racial discrimination is totally groundless	10
6. The validity of Article 2351½(c) has never been passed on by the Texas Supreme Court in any case, including that of *C. R. Davis v. Steven C. Oaks*, No. B-4542 (17 Sup. Ct. Journal 256), as urged by Appellees	11
7. The conclusion of Texas Attorney General advisory opinion No. H-220, January 29, 1974, is not the law of Texas, having been reached in erroneous reliance on the Texas case of *McGuire v. Hughes*, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX	17

TABLE OF CITATIONS

CASES

	Page
Avery v. Midland County, Texas, 390 U.S. 474	5, 7, 8
Baker v. Carr, 369 U.S. 186	5
Barrett v. Atlantic Richfield Co., 444 F.2d 38	8
Buchanan v. Rhodes, 249 F.Supp. 860, appeal dism. 385 U.S. 3	6

CASES

	Page
City of Meridian v. Southern Bell Tel Co., 358 U.S. 639	7
Davis v. Oaks, No. B-4542 (17 Tex. Sup. Ct. Journal 256)	11, 12
Grant v. Ammerman, 451 S.W.2d 777 (Tex. Civ. App. 1970, err. ref. n.r.e.)	14
Harman v. Forsseniuns, 380 U.S. 528	8
Higginbotham v. City of Baton Rouge, La., 306 U.S. 535	3
Kail v. Rockefeller, 275 F.Supp. 937	6
McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)	12, 14
Reynolds v. Sims, 377 U.S. 533	5
Romero v. Coldwell, 455 F.2d 1163	7
Snowden v. Hughes, 321 U.S. 1	3
State ex rel. Dowlen v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897, err. den. 43 S.W. 1101)	3
Taylor v. Beckham, 178 U.S. 548	3
Williams v. Castleman, 247 S.W. 263 (Tex. Sup. Ct. 1922)	5
Wisconsin v. Constantineau, 400 U.S. 433	8
Wright v. Rockefeller, 376 U.S. 52	11

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Rule 15, Supreme Court Rules	1
Article V, Section 19, Vern. Ann. Tex. Const.	8
Article 2351½ Vern. Ann. Tex. Civ. Stat.	2, 4, 9, 11, 12, 13, 14
Article 2385, Vern. Ann. Tex. Civ. Stat.	8
Article 2460a, Vern. Ann. Tex. Civ. Stat.	8
Article 4.11, Vern. Ann. Tex. Code of Crim. Proc.	8
Article 4.12, Vern. Ann. Tex. Code of Crim. Proc.	8
Article 45.22, Vern. Ann. Tex. Code of Crim. Proc.	8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

---

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellants respectfully submit the following in response to the Appellees' Motions To Dismiss or Affirm.

ARGUMENT AND AUTHORITIES

1. Subparagraph (g) of Rule 15, Supreme Court Rules, is not applicable to this appeal, and even if it were, Appellants' Jurisdictional Statement is nevertheless in full compliance therewith.

Appellee Zaboroski contends first that this appeal should be dismissed on the ground that Appellants have failed

to comply with Rule 15 of the Supreme Court Rules, which requires that in an appeal from a decree of a district court granting an "interlocutory injunction," an appellant's jurisdictional statement must "include a showing of the matters in which it is contended that the court has abused its discretion by such action." Such contention is wholly without merit for the reason that the District Court's injunction was not interlocutory, but as Appellee himself points out at page 2 of his brief, and as clearly revealed by the District Court's Judgment Order set out at page 34 as Exhibit A of Appellants' Jurisdictional Statement, such injunction was permanent. In any event the reasons and supporting authorities therefor set out in Appellants' Jurisdictional Statement amply support the proposition that the District Court did indeed abuse its discretion in declaring the Texas statute, Article 2351½ V.A.C.S., to be "facially unconstitutional" and in decreeing that the order of the Commissioners Court of Harris County, Texas, of June 28, 1973, redistricting the County's eight justice of the peace and constable precincts, be "permanently enjoined."

2. The Order of the Commissioners Court redistricting the County's eight justice precincts in no way abridged any citizen's right to vote.

To Appellee Zaboroski's contention that "Article 2351½ deprives the voters of their equal protection rights, in that the right to vote for Justices of newly created precincts is guaranteed in some precincts and arbitrarily denied in others." Appellants would respond by saying that in the recently held party primaries on May 4, 1974, the two positions for justice of the peace in all eight of the County's justice precincts were on the ballot and up for election, and all citizens in each of the precincts were

entitled to vote for the candidates of their choice in their respective precincts. Appellee Zaboroski was indeed himself on the ballot as a candidate for justice of the peace of Precinct 4, Position 1, and was elected as his party's nominee for such position.

To said Appellee's claim that his right and that of the others to hold office has been unconstitutionally abridged by "complete ouster without cause or due process," Appellants would again cite to the Supreme Court the decisions of *Taylor v. Beckham,* 178 U.S. 548, in which it is declared that "In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office;" *Higginbotham v. City of Baton Rouge, La.,* 306 U.S. 535, in which it is declared that "the legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service;" and *Snowden v. Hughes,* 321 U.S. 1, under which the right to continue in office which Appellees assert is clearly within those "rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law," as distinguished from those rights of a citizen derived from his national citizenship.

In this latter regard Appellants would also again cite to the Court the language in *State ex rel. Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Civ. App. 1897, application for writ of error denied by the Texas Supreme Court at 43 S.W. 1101, for the reason that the case was "correctly decided in the court of civil appeals"), to the effect that

". . . the power to establish the precincts does not necessarily conflict with the provisions fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. * * * While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such actions." See Appellants' Jurisdictional Statement, pages 11-13.

That there was ample justifiable cause for the effect of Article 2351½ vacating the offices of the five office holding Appellees in this case is clearly borne out by the critical need to eliminate to as great an extent as practicable the severe malapportionment of the old precincts, which had not been reapportioned since 1876, coupled with the compelling state interest of requiring that the precinct officers in question reside in the precinct in which they serve.

In addition, the due process of which Appellees complain they were deprived was fully available to them by virtue of the many highly publicized public meetings held by the redistricting committee of nine persons appointed to study the question and of those involving the deliberations of the Commissioners Court, including those held at meetings prior to the meeting on June 28, 1973 at which the redistricting order in question was passed. Further, Appellees clearly could have invoked the due process afforded them by state constitutional Article 5, Section 8 and state statutory Article 1908, which vest in a Texas District Court the "appellate jurisdiction and general supervisory control" over the Commissioners Court, to determine whether such body acted in a manner

amounting to a gross abuse of power or in a manner fraudulently or grossly arbitrary to the detriment of the Appellees. *Williams v. Castleman,* 247 S.W. 263 (Tex. Sup. Ct. 1922). See page 13 of Appellants' Jurisdictional Statement.

3. Appellees lack standing to urge any invalidity of the redistricting in question on the basis that it allegedly fails to comport with the "one man-one vote" principle.

Aside from the fact that the District Court did not treat of the question of the applicability of the "one man-one vote" principle to the particular kind of political subdivision in question, the Appellees lack standing to complain that the redistricting in question might not have met the mathematical preciseness of this doctrine. All six of the Appellees reside in new Precinct 4. Such precinct, with a population count of 175,769, is the third smallest, population-wise, of the eight new precincts. Surely, they cannot be heard to say that they are aggrieved by the fact that the Commissioners Court might not have adhered to the "one man-one vote" principle in redistricting the eight precincts in question. Their right to vote cannot be said to be "debased" or "diluted" by reason of the unequal population counts of such precincts. *Avery v. Midland County, Texas,* 390 U.S. 474; *Reynolds v. Sims,* 377 U.S. 533; *Baker v. Carr,* 369 U.S. 186.

Even if it could be said that Appellees could be heard to complain on this point, it is submitted that such constitutional principle is not even in any way applicable to the type of districts or precincts of which justices of the peace and/or constables hold their offices therein.

In *Kail v. Rockefeller,* 275 F. Supp. 937 (1967), a case in which it was contended that there was a malapportionment of state judges as between counties in a certain judicial district, the Court, in dismissing the complaint on the ground that the issue as to how judges should be distributed was of a peculiarly state political nature, declared:

> "Within the year, other attempts have been made to have federal courts invade State territory and usurp State powers. In Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio, E.D. 1966), appeal dismissed, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966) the plaintiffs there sought to attack the Ohio Constitution which provided for one Common Pleas judge for each county. The county population disparity was substantial. The problem was quite similar to that presented here and the self-answering questions cannot be better stated than by Chief Judge Connell who said:
>
> "*We are surprised that the plaintiffs would have us reapportion only the judges* in the trial courts of the state. *Should we not also reapportion the number of sheriffs and their deputies* so that litigants in heavily populated counties will have an opportunity to secure quicker service of process? *Should we not also reapportion the number of clerks of court and their deputies* so that litigants in heavily populated counties will have more expeditious processing of the paper work involved in litigation? Since the prejudicial delay is also caused by a paucity of trial lawyers, *shall we, considering lawyers as officers of the court* (to satisfy the 'state action' requirement for invoking the Fourteenth Amendment), *reapportion their number among the eighty-eight counties of Ohio?* And if this Court can affect the destinies of men by amending an entire judicial structure,

what of mere brick and mortar? *Should we not also reapportion the number of courthouses and courtrooms* in the various counties? These questions supply their own answers. (249 F. Supp. p. 862)." (Emphasis Supplied)

In *Romero v. Coldwell,* 455 Fed. 2d 1163 (1972), suit was brought expressly for a determination of whether the "one man-one vote" concept applied to Justices of the Peace in Texas counties. The District Court had dismissed the Plaintiffs' cause on the ground that *Avery v. Midland County,* supra, had no application. The Fifth Circuit Court of Appeals declared:

"The petition alleged that El Paso County is divided into eight justice of the peace precincts each precinct having one justice of the peace except for one precinct which has two, and that the precincts are widely varying in population, with the result that the votes of persons in the more populous precincts are diluted. The petition contained no allegations describing the jurisdiction of justices of the peace in El Paso County. However, in this court appellants contend that each justice of the peace has county-wide jurisdiction, and they acknowledge that this is the linchpin of their case. *It appears that this is a question that is neither settled nor clear under Texas law. We affirm the dismissal on the ground of abstention rather than on the ground stated by the trial judge, but modify it to provide it is without prejudice."*

* * *

". . . *decision of unsettled state law by the state courts in the first instance 'is especially desirable where the questions of state law are enmeshed with federal questions;'* City of Meridian v. Southern Bell Tel. Co., 358 U.S. 639, 640, 79 S.Ct. 455, 3 L.Ed.2d

562, 563 (1959), unless the state statute is clear and unambiguous in all respects and does not render decision of the constitutional question unnecessary, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), Harman v. Forssenius, 380 U.S. 528, 35 S.Ct. 1177, 14 L.Ed.2d 50 (1965).

* * *

"Clarity and unambiguity are lacking with respect to territorial jurisdiction of a Texas justice of the peace, given the disparity between C.C.P. arts. 4.12 and 45.22 which speak in terms of government units and C.C.P. art. 4.11, Tex. Rev. Civ. Stat. Ann. arts. 2385, 2460a, and Texas Const. art. V, § 19, all of which go to subject matter jurisdiction. *It is possible that the Texas Courts may flesh out the bare bones of the constitution and statutes by finding the boundary of the jurisdiction of a justice of the peace coincident with the precinct from which he is elected rather than county-wide.*

* * *

"*. . . thus, dismissal by the federal court is appropriate in order that the plaintiffs may proceed in the Texas courts if they wish but the dismissal must be without prejudice.* Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971)." (Emphasis supplied)

Finally, it is submitted that justices of the peace and constables, unlike the county commissioners dealt with in *Avery v. Midland County, Texas,* supra, do not exercise general governmental powers over the entire geographic area of the county. Thus the "one man-one vote" principle enunciated in the many prior cases on this question has no application to such districts as the justice of the peace and constable precincts in question.

4. The different treatment accorded by Article 2351½ to county commissioners on the one hand and justices of the peace and constables on the other is not a legislative distinction that is either arbitrary or invidious.

Appellees complain that Article 2351½ arbitrarily and irrationally discriminates between justices of the peace and constables on the one hand and county commissioners on the other, favoring the latter. It is contended that since section (b) of the statute provides that the terms of county commissioners are not to be affected by a change in a redistricting of commissioner precincts, section (c), in effecting a vacancy or vacancies in the justice of the peace and constable positions where after a redistricting there reside in a particular precinct or precincts an excessive number of such officers for the limited number of positions authorized therein, discriminates against justices of the peace and constables. Appellees' argument overlooks the fact that commissioners are not officers of the particular precincts from which they are elected; they are county officers serving the entire county. Even though a redistricting places a commissioner's residence outside of the precinct from which he was elected, his residence still is within the political unit, to-wit, the county, which he was elected to serve. This is not so with justices of the peace and constables. A redistricting which leaves these officers outside of the precinct from which they were elected, obviously places them outside the political unit which they were elected to serve, to-wit, the justice or constable precinct. This legislative distinction is a wholly reasonable one in the light of the residency requirement of Texas Election Code Article 1.05, set out at page 44 of Appellants' Jurisdictional Statement. See also *Whitmarsh v. Buckley*, 324 S.W.2d 298 (Tex. Civ. App. 1959, no

writ history) at pages 17 and 20 of Appellants' Jurisdictional Statement.

5. Appellees' claim of gerrymandering for purposes of racial discrimination is totally groundless.

Appellees, both in the trial court and on this appeal, contend that the Commissioners Court employed "racial reasoning" in realigning the eight precincts in question to create a "safe" precinct for blacks and one such precinct for Mexican Americans. Such a claim is based on the fact that blacks comprise 58.4% and Mexican Americans 5.5% of new Precinct 7 and Mexican Americans comprise 35.2% and Blacks 29.0% of new Precinct 6 (Exhibit No. 11 to Stipulation of the Parties—See Paragraph No. 15 of the Stipulation at page 218 of the Record). As a result of the large percentage of Blacks in Precinct 7 the Commissioners Court appointed two Blacks as justices of the peace and one as the constable for such precinct. As a result of the large percentage of the Latin Americans in Precinct 6, the Commissioners Court appointed two of their race as justices of the peace and one as constable of such precinct.

The appointment of Blacks and Mexican Americans to these posts of justice of the peace and constable represent the first time ever in the history of Harris County, Texas, that members of these two races have held such offices. A consideration such as promoting the participation of minorities in the political structure of county government would seem to a laudatory one, but Appellees would have the Court view such as evil and invidious discrimination. The deposition testimony of County Judge Bill Elliott and County Commissioners Bass and Bray, detailing the many reasons motivating the Com-

missioners Court's realignment of the precincts, summarized at page 5 of Appellants' Jurisdictional Statement, clearly support a conclusion contrary to Appellees' claim in this matter. See *Wright v. Rockefeller,* 376 U.S. 53.

6. The validity of Article 2351½(c) has never been passed on by the Texas Supreme Court in any case, including that of C. R. Davis v. Steven C. Oaks, No. B-4542 (17 Tex. Sup. Ct. Journal 256), as urged by appellees.

In *Davis v. Oaks,* Davis was the constable of old Precinct 4 in Harris County prior to the redistricting order of June 28, 1973. After the redistricting and as a result of it, three constables of various of the former precincts ended up residing in new Precinct 4. The position of constable for this new precinct was therefore considered vacated by the effect of Article 2351½(c). The Commissioners Court then pursuant to Article 2355, V.A.C.S., proceeded to fill such vacancy by appointment, appointing Davis. As a result of the requirement of said Article 2355 that an appointee must run at the next succeeding General Election following his appointment to office, the position was put on the ballot for the Democratic party primary after one Eddings announced his candidacy therefor. Davis then filed his candidacy for said office.

Thereafter, Davis, represented by counsel for Appellees Moore et al. herein, filed suit in state District Court against Oaks, the Chairman of the County Executive Committee of the Democratic Party, seeking a mandamus to compel Oaks to remove the position from the ballot on the ground that he, Davis, had been elected as Constable of Precinct 4 in 1972 for a four-year term, and that he was entitled to serve out the remainder of such

term without undergoing the 1974 General Election process, notwithstanding the redistricting which materially changed the makeup of such precinct.

The State District Court, without rendering an opinion, denied the application for mandamus. On appeal, the Texas Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at Houston, in an opinion as yet unreported but appended hereto as Exhibit A, dismissed the case as moot for reasons set out therein.

Thereafter, Davis filed in the Texas Supreme Court, in an original proceeding therein as authorized by Article 1735a, V.A.C.S., a motion for leave to file a petition for writ of mandamus. The Texas Supreme Court on April 3, 1974, without a hearing and without issuing an opinion, entered an order noting simply, "motion for leave to file petition for writ of mandamus was this day overruled." Thus the case of *Davis v. Oaks* cannot in any way be said, as Appellees would have it, to be a case in which Article 2351½(c) has been authoritatively construed by the Texas Supreme Court for the benefit of the bench and bar of Texas.

7. The conclusion of the advisory opinion of the Attorney General of Texas, Opinion No. H-220, January 29, 1974, is not the law of Texas, having been reached in erroneous reliance on the Texas case of McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history).

In *McGuire v. Hughes*, copy of the opinion being appended hereto as Exhibit B, McGuire had been elected one of two justices of the peace in a two justice precinct in 1960 for a four year term beginning January 1, 1961. His position was Precinct 1, Place 1. He was re-elected

to the position in 1964 for a four year term beginning January 1, 1965.

In January of 1967 the Commissioners Court abolished the position of justice of the peace, Place 2 in said justice precinct. In 1968 McGuire was re-elected to the position of justice of the peace, Place 1 for another four year term beginning January 1, 1969.

On January 13, 1969, the Texas Secretary of State ruled that inasmuch as the Commissioners Court had abolished the justice position of Place 2 in the precinct, the precinct was a single justice precinct, the term of which justice under the Texas constitutional time table for terms of office, set out in Article 16, Section 65 (Exhibit C hereto) would end December 31, 1970, and the office would thus be on the ballot for the General Election of 1970, notwithstanding that McGuire would have two more years of office having been elected in 1968 for a four year term.

In granting McGuire's application for mandamus to have the office removed from the ballot in the party primary for the 1970 General Election, the Texas Court of Civil Appeals simply held that "The fact that the Commissioners Court of Grayson County abolished the Office of Justice of the Peace, Precinct 1, Place 2, in 1967, does not, in our opinion, have the legal effect of reducing the constitutional four year term of Justice of the Peace, Precinct 1, Place 1, Grayson County to two years."

The Court was not confronted with any kind of re-districting or realigning of the precinct lines and the applicability of Article 2351½(c) did not in any way come into question. Nor was there any question of the

applicability of Article 1.05, Vern. Ann. Tex. Election Code, relating to precinct residency requirements. Of significance also, as the Court pointed out, Article 5, Section 18 of the Texas Constitution requires "that in any precinct in which there may be a city of 8,000 or more inhabitants, there *shall* be elected two justices of the peace. It is stipulated that Precinct 1 of Grayson County, Texas contains a city, namely Sherman, which has more than 8,000 inhabitants." Thus, the Commissioners Court of such County really had no authority under the Texas Constitution to abolish one of the justice positions in the first place. See *Grant v. Ammerman*, 451 S.W.2d 777 (Tex. Civ. App. 1970, err. ref. n.r.e.).

McGuire v. Hughes is thus clearly distinguishable, both on the facts and the law, from the factual situation and the legal question propounded to the Texas Attorney General in his advisory opinion No. H-220, upon which Appellees so strongly rely. It is respectfully submitted that because the writer of Texas Attorney General Opinion No. H-220 erroneously relied on *McGuire*, the conclusion of such opinion is not the law of Texas. In any event the Texas Supreme Court should be given the opportunity to give the final pronouncement of what the law of Texas is on this matter.

CONCLUSION

It is again respectfully urged that the District Court erred in declaring the Texas statute Article 2351½ to be facially unconstitutional and in permanently enjoining the Harris County Commissioners Court's order of June 28, 1973, redistricting the County's justice of the peace and constable precincts; and that the questions presented by this appeal are substantial and of public importance, for

which reasons it is prayed that probable jurisdiction be noted.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

By Edward J. Landry
EDWARD J. LANDRY
Senior Assistant County Attorney

By Michael R. Davis
MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151
Attorneys for Appellants

CERTIFICATE OF SERVICE

(1) The undersigned counsel for the Appellants do hereby certify that on this 27th day of May, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Appellants' Response To Appellees' Motions To Dismiss Or Affirm."

VIRGIL H. BARFIELD
Attorney in Charge
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
Attorney in Charge
For Appellee Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

GERALD A. WOOLF
Of Counsel
For Appellee Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

DAVID HOLLINGSWORTH
Of Counsel
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

LARRY B. KERFOOT
Attorney in Charge
For Appellee Blackie Neeley
910 Houston Bar Center Bldg.
Houston, Texas 77002

JOHN M. O'QUINN
Attorney in Charge
For Intervenor-Petitioners
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

WESLEY H. HOCKER
Attorney in Charge
For Intervenor-Petitioners
Harris County Democratic Executive Committee
1020 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

(2) All parties required to be served have been served.

Signed:

Edward J. Landry

EDWARD J. LANDRY
Senior Assistant County Attorney

Michael R. Davis

MICHAEL R. DAVIS
Assistant County Attorney
Attorneys for Appellants

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A—Opinion of the Texas Court of Civil Appeals for the 14th Supreme Judicial District, at Houston, in the case of Davis v. Oaks, No. 1006, as yet unreported

Exhibit B—Opinion of the Texas Court of Civil Appeals for the 5th Supreme Judicial District, at Dallas, in the case of McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)

Exhibit C—Article 16, Section 65 of Vernon's Annotated Texas Constitution

EXHIBIT A

Case Dismissed as Moot, and Opinion filed March 20, 1974.

NO. 1006

C. R. DAVIS, Appellant

vs.

STEVEN C. OAKS, ET AL, Appellees

Appeal from 133rd District Court
of Harris County

This is an attempted appeal by C. R. Davis from a judgment of a district court of Harris County denying what he calls his petition for writ of mandamus.

The appellant, Davis, was elected in 1972 to the office of Constable, Precinct No. 4, Harris County, Texas. The term to which he was elected began January 1, 1973, and was to continue through December 31, 1976. On June 28, 1973, the Harris County Commissioners Court redistricted the constable precincts of Harris County. The new Precinct No. 4 consisted of all of old Precincts 4, 5, and 7 and parts of 3 and 6. There were three persons, including Davis, residing in the new Precinct 4 who had been Constable of an area included therein. The Commissioners Court of Harris County, effective July 1, 1973, appointed Davis as Constable of the new Precinct 4. This action was pursuant to Tex. Rev. Civ. Stat. Ann. art. 2351½ (1971).

Both Davis and Larry Eddings have filed as candidates for the Democratic nomination for the office of Constable of Precinct 4 in the primary election to be held on May 4,

1974. No one filed as candidate for such nomination in the Republican party. Steven Oaks, Chairman of the Democratic Executive Committee, has certified to the County Clerk a list of candidates, which list includes both Davis and Eddings as candidates for the office of Constable, Precinct 4, Harris County.

Davis filed suit in the district court against Oaks, Eddings, and R. E. Turrentine, Jr., County Clerk of Harris County. He prayed for issuance of a writ of mandamus "ordering and commanding the Defendants to remove the office of Constable, Precinct No. 4 of Harris County, Texas, from the ballot during the Democratic Primaries set for May 4, 1974." After a hearing in which the facts were stipulated, the trial judge on March 11, 1974, denied the relief sought by Davis. Davis appealed to this Court, and the parties agreed that the appeal be preferentially set for March 19, 1974.

It is the appellant's position that he was, in 1972, elected to a four-year term as Constable of Precinct 4 and that there is not, and will not be until January 1, 1977, any vacancy in that office. For the reasons hereinafter stated, we are unable to pass on the merits of that contention.

The first primary is to be held on May 4, forty-one days from this date. Absentee voting in that election will begin on April 22, twenty-nine days from this date. The Chairman of the Harris County Democratic Executive Committee has announced his intention of letting a contract for the printing of the ballots to be used in such election on March 25, five days from this date. The drawings for positions on the ballot have already been held.

If we were to decide the merits of the case, the losing side would have fifteen days, until April 12, in which to file a motion for rehearing. Assuming that motion was overruled at once, the losing party would have thirty days thereafter in which to file application for writ of error—until May 13, after the primary.

It can readily be seen that the losing side could not, if we were to decide the merits of this appeal, follow the appellate procedures available to that side without sacrificing some of the time given by the Texas Rules of Civil Procedure. We, therefore, on the authority of McGee v. McKaskle, 499 S.W.2d 755 (Tex. Civ. App. —Houston [1st Dist.] 1973; no writ), and the authorities cited therein, dismiss this case as moot.

Per Curiam

Judgment rendered, and opinion filed March 20, 1974.

EXHIBIT B

A. L. McGUIRE, Relator,

v.

CHARLES E. HUGHES, Repondent.

No. 17477.

Court of Civil Appeals of Texas, Dallas.
Feb. 24, 1970.

Proceeding for writ of mandamus directing party county chairman to omit from official ballot of primary election the office of justice of the peace. The Court of Civil Appeals, Claude Williams, J., held that fact that Commissioner's Court of Grayson County abolished office of justice of the peace, Precinct 1, Place 2, in 1967, did not have effect of reducing constitutional four-year term of justice of the peace, Precinct 1, Place 1, Grayson County to two years, and term of office of justice of the peace, Precinct 1, Place 1, Grayson County to which incumbent was elected in 1968, was for a period of four years, ending December 31, 1972.

Writ granted.

CLAUDE WILLIAMS, Justice.

This is an original proceeding wherein Relator A. L. McGuire asks us to issue a writ of mandamus directing the Respondent Charles E. Hughes, Democratic County Chairman of Grayson County, Texas, to omit from the official ballot of the primary election of the Democratic Party in Grayson County, Texas, to be held on May 2,

1970, the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas.

A. L. McGuire is the duly elected and acting Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas. Respondent Charles E. Hughes is the duly elected and acting Democratic County Chairman of the Democratic Party Executive Committee of Grayson County, Texas.

Relator was elected to the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, in 1960, for a term of four years, which he served. In 1964 he was re-elected for another four-year term, which he served. By order dated January 24, 1967, the Commissioners Court of Grayson County, Texas abolished the office of Justice of the Peace, Precinct 1, Place 2, Grayson County, Texas. In 1968 Relator was again a candidate for the office of Justice of the Peace, Precinct 1, Place 1, in the primary election of the Democratic Party held in May 1968. He was duly elected as the Democratic nominee. Thereafter he was elected to said office in the general election held in November 1968. The ballot in both the primary and general elections of 1968 did not contain the words "unexpired term" printed after the title to the Office of Justice of the Peace, Precinct 1, Place 1.* Thereafter in January 1969 Relator was sworn into said office and has continued to serve in said position since that time.

On January 13, 1969 the Office of the Secretary of State of Texas wrote Paul E. Lee, County Clerk of Grayson County, Texas, a letter concerning the office of

---

* V.A.T.S. Election Code, Art. 6.05d, provides:

"Whenever, in any general election or in any primary election for making nominations for a general election, an election is to be held for an unexpired term in an office, the words 'unexpired term' shall be printed after the office title on the official ballot."

the Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas. Therein it was stated, as the opinion of the Secretary of State, that in view of the abolition of the other justice precinct that Precinct 1, Place 1, was a "one-justice" precinct and that Relator had really been elected in 1968 to serve the unexpired portion of the regular term and that such term would expire December 31, 1970. After receipt of this letter Paul E. Lee, County Clerk, advised Respondent Charles E. Hughes that he would place the office of Justice of the Peace, Precinct 1, Place 1, on the ballot in the general election and that the County Chairman should do the same for the Democratic Primary. On Friday, January 30, 1970 Relator was informed by Respondent, acting in his capacity as Democratic County Chairman, that an election for the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, would be held in the primary election of the Democratic Party to be held on May 2, 1970 and that if Relator desired to be a candidate for such office it would be necessary that he file his application as a candidate before the deadline for filing, to-wit, February 2, 1970. Respondent also advised Relator that one other candidate had already filed his application to be placed on the ballot. Thereafter, before the filing deadline other candidates filed their applications to be placed on the official ballot for said office.

Relator, through his attorney of record, requested Respondent not to place any names of candidates on the official ballot for the reason that Relator had been duly and legally elected in 1968 for a period of four years and such term would not expire until December 31, 1972. Respondent, acting upon information and opinion rendered to him by the County Clerk as well as the Secre-

tary of State of the State of Texas, and having no personal interest in the matter but acting solely in his official capacity, informed Relator that an election would be held for said office in the primary election of the Democratic Party and that all candidates who timely and properly filed their applications would be placed on the official ballot and that the winner would be the Democratic nominee for Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, in the general election to be held in November 1970. It is this action that Relator asks us to prevent.

We have jurisdiction of this matter pursuant to the specific provisions of Art. 1735a, Vernon's Ann. Civ. St. of Texas. The primary question to be decided is whether the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, is required to be filled by the 1970 general election of the State of Texas.

Respondent advances no legal argument for or against Relator's position, candidly stating that he is in no way personally a party to this suit and that in expressing his purpose to include the office in question on the Democratic Primary ballot on May 2, 1970 he was doing so in accordance with directives of the Secretary of State of the State of Texas who is designated as the Chief Election Officer of the State. He asks that we consider all of the law on the question in justice to all of the parties and that he will obey the mandate of the court. We commend Respondent for his attitude and the position he takes.

While Relator has supported his contention with several points we believe that the question presented is clearly and definitely answered by the plain and explicit provisions of the Constitution of the State of Texas.

Formerly justices of the peace of the State of Texas were elected for a two-year term. In 1954 Art. 5, Sec. 18

of the Constitution of the State of Texas, Vernon's Ann. St., was amended by the people so as to provide that the office of justice of the peace was converted from a two- to a four-year term. The same section of the Constitution provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two justices of the peace. It is stipulated that Precinct 1 of Grayson County, Texas contains a city, namely Sherman, which has more than 8,000 inhabitants.

In 1954 there were two justices of the peace in Precinct 1, and said offices continued until the abolishment of the office of Place 2, by order of the Commissioners Court in 1967.

In the same year, 1954, Art. 16, Sec. 65, of the Constitution of the State of Texas, was amended and the last paragraph thereof provided:

> "In any district, county or precinct where any of the aforementioned offices [including justices of the peace] is of such nature that two or more person hold such office, with the result that candidates file for 'Place No. 1,' 'Place No. 2,' etc., the officers elected at the general election in November, 1954, shall serve for a term of two years if the designation of their office is an uneven number, and for a term of four years if the designation of their office is an even number. *Thereafter, all such officers shall be elected for the terms provided in this Constitution.*" (Emphasis supplied.)

[1] By the plain provisions of this section of the Constitution the Justice of the Peace for Precinct 1, Place 1, Grayson County, Texas, would run for a two-year term in 1954. Then, in 1956 the term would become a four-year term, as provided by the provisions of Art. 5, Sec. 18,

of the Constitution, which would make the term expire in 1960. Thus, when Relator McGuire was elected in 1960 and in 1964 there was no question but that such terms were for a four-year period. The fact that the Commissioners Court of Grayson County abolished the Office of Justice of the Peace, Precinct 1, Place 2, in 1967, does not, in our opinion, have the legal effect of reducing the constitutional four-year term of Justice of the Peace, Precinct 1, Place 1, Grayson County to two years. The constitutional provision is clear and unambiguous that following the first two-year term of the uneven numbered office (as was Place No. 1) that thereafter, all justices of the peace would be elected for the term provided for in the Constitution, namely, four years. We hold that under such constitutional mandate the term of office to which Relator McGuire was elected in 1968 was for a period of four years, ending December 31, 1972.

[2, 3] It has been declared in many cases that a public office is property. 47 Tex. Jur. 2d, § 7, p. 18. This is certainly true in the sense that a person elected to an office established by law, and duly qualified for same by taking the oath of office, has a property right to the possession of the office and enjoyments of its rights and emoluments all of which the Constitution protects and the courts will enforce. State ex rel. Jennett v. Owens, 63 Tex. 261 (1885). Judge McGuire was duly and legally placed into possession of his office in 1968 for a constitutional term of four years. During that period he has the vested right and privilege to exercise the official duties of the office and to receive the compensation provided by law. Such may not be denied him by administrative edict or as a result of the Commissioners Court's action in abolishing another office in the same precinct.

To sanction such would open wide a Pandora's Box of uncertainty and confusion.

Accordingly, it is evident that the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, should not appear on the ballot of the Democratic Primary on May 2, 1970 and that a writ of mandamus should be and is here and now issued directing that Respondent Charles E. Hughes, as Democratic County Chairman of Grayson County, Texas, be directed to omit from the official ballot of the primary election of the Democratic Party in Grayson County, Texas to be held on May 2, 1970, the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, as well as the names of any candidates who filed an application with Respondent to have their names placed on the official ballot for such office.

Petition for writ of mandamus granted, as prayed.

EXHIBIT C

ARTICLE 16, TEXAS CONSTITUTION

§ 65. Transition from two year to four year terms of office

Sec. 65. Staggering Terms of Office—The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for "Place No. 1," "Place No. 2," etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for

a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. As amended Nov. 4, 1958.

FILED
JUL 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, et al.,
Appellants
v.
RICHARD E. MOORE, et al., *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

BRIEF FOR THE APPELLANTS

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

MICHAEL R. DAVIS
Assistant County Attorney

202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151

Attorneys for Appellants

Date: July 18, 1974

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. The vacating of the offices in question pursuant to Article 2351½(c) was not violative of the equal protection guarantee of the Fourteenth Amendment, since compelling state interests were served and since such offices are local offices created for purely state purposes and their creation, rearrangement or abolishment for compelling state reasons relate solely to the internal administration of the state's political structure	11
A. History of the Texas Law	15
B. Compelling state interests were served by the redistricting and by the application of Article 2351½(c)	20
II. The District Court should have abstained from deciding this cause to afford the Texas Courts the opportunity to determine whether justices of the peace and constables are "county officers" whose residence need only be in the county, as distinguished from residence within the precinct, the resolution of which in favor of Appellees would render unnecessary a federal constitutional decision	31
CONCLUSION	43
CERTIFICATE OF SERVICE	44
APPENDIX	45

TABLE OF CITATIONS

CASES

	Page
Ahern v. Murphy, 457 Fed.2d 363	24
Asburn Brothers v. Edwards County, 58 S.W.2d 71 (Tex. Comm. App. 1933)	41
Avery v. Midland County, Texas, 390 U.S. 474	3, 4
Barrett v. Atlantic Richfield Co., 444 Fed.2d 38	34

CASES

	Page
Bourgeois v. Mills, 60 Tex. 76 (1883)	41
Brazos River Conservation and Reclamation Dist. v. Belcher, 163 S.W.2d 183 (Tex. Sup. Ct. 1942)	42
Breedlove v. Suttles, 302 U.S. 277	12
Carr v. Brazoria County, Texas, 341 F. Supp. 155, aff'd 468 Fed.2d 950	29, 30, 34, 42
Childress County v. Sachse, 312 S.W.2d 380 (Tex. Sup. Ct. 1958)	25, 26, 27, 36
Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (Mich. Sup. Ct. 1971, appeal dism. 405 U.S. 950)	23, 27
Glenn v. Milam, 263 S.W. 900 (Tex. Sup. Ct. 1924)	42
Gomillion v. Lightfoot, 364 U.S. 339	12
Grant v. Ammerman, 437 S.W.2d 547 (Tex. Sup. Ct. 1969)	41, 42
Grant v. Ammerman, 451 S.W.2d 777 (Tex. Civ. App. 1970, error refused, n.r.e.)	38, 42
Hadnott v. Amos, 320 F. Supp. 107, aff'd 401 U.S. 968	22, 27
Haverbekken v. Hale, 204 S.W. 1162 (Tex. Sup. Ct. 1918)	41
Higginbotham v. City of Baton Rouge, 306 U.S. 535	11
J. R. Phillips Investment Co. v. Road District No. 18 of Limestone County, 172 S.W.2d 707 (Tex. Civ. App. 1943, error refused)	41
Lamb v. State ex rel. Johnson, 267 S.W.2d 285 (Tex. Civ. App. 1954, no writ history)	37
Matthaei v. Clark, 216 S.W. 856 (Tex. Sup. Ct. 1920)	42
McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)	38, 39
Minor v. Happersett, 22 L.Ed. 627	12
Newton v. Mahoning County Commissioners, 100 U.S. 548	12
Pate v. El Paso County, Texas, 337 F. Supp. 95, aff'd 400 U.S. 806	28, 29, 30
Pope v. Williams, 193 U.S. 621	12
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496	42
Robinson v. Zapata County, Texas, 350 F. Supp. 1193	29, 30, 34, 42
Rodriguez v. Vera, 249 S.W.2d 689 (Tex. Civ. App. 1952, no writ history)	41
Romero v. Coldwell, 455 F.2d 1163	33, 42
Sailors v. Board of Education of County of Kent, 387 U.S. 105	13
Scott v. Graham, 292 S.W.2d 324 (Tex. Sup. Ct. 1956)	41
Snowden v. Hughes, 321 U.S. 1	12
State v. Reyna, 333 S.W. 832 (Tex. Sup. Ct. 1960)	37
State ex rel. Dowlen v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897, aff'd 43 S.W. 1101)	15, 39
Tarrant County v. Shannon, 104 S.W.2d 4 (Tex. Sup. Ct. 1937)	41

CASES

	Page
Taylor v. Beckham, 178 U.S. 548	11
Telles v. Sample, 500 S.W.2d 677 (Tex. Civ. App. 1973, error refused, n.r.e.)	40
Villareal v. Brooks County, 470 S.W.2d 60 (Tex. Civ. App. 1971, no writ history)	31, 32, 36
Villareal v. Bustamente, 480 S.W.2d 231 (Tex. Civ. App. 1972, no writ history)	26, 37
Ward v. Bond, 10 S.W.2d 590 (Tex. Civ. App. 1928, no writ history)	17, 18
Whitmarsh v. Buckley, 324 S.W.2d 298 (Tex. Civ. App. 1959, no writ history)	21, 26, 27
Williams v. Castleman, 247 S.W. 263 (Tex. Sup. Ct. 1922)	16
Wilson v. North Carolina, 169 U.S. 586	11

CONSTITUTIONAL AND STATUTORY PROVISIONS AND MISCELLANEOUS

28 U.S.C.A. 134	24
28 U.S.C.A. 561	24
28 U.S.C.A. 1253	2
Article 5, Section 18, Vern. Ann. Tex. Const.	3, 9, 16, 38, 39
Article 5, Section 19, Vern. Ann. Tex. Const.	33
Article 5, Section 24, Vern. Ann. Tex. Const.	32, 37, 39
Article 1908, Vern. Ann. Tex. Civ. Stat.	7, 18, 41
Article 2351½, Vern. Ann. Tex. Civ. Stat.	cited throughout brief
Article 2355, Vern. Ann. Tex. Civ. Stat.	7
Article 5, Section 8	7, 15, 41
Article 2385, Vern. Ann. Tex. Civ. Stat.	23, 33
Article 2460a, Vern. Ann. Tex. Civ. Stat.	23, 33
Article 1.05, Vern. Ann. Tex. Election Code.	6, 9, 14, 21, 24, 32, 38, 41
Article 4.11, Vern. Ann. Tex. Code of Crim. Proc.	23, 33
Article 4.12, Vern. Ann. Tex. Code of Crim. Proc.	33
Article 4.13, Vern. Ann. Tex. Code of Crim. Proc.	23
Article 15.01, Vern. Ann. Tex. Code of Crim. Proc.	23
Article 45.22, Vern. Ann. Tex. Code of Crim. Proc.	33
Rule 483, Vern. Ann. Tex. Rules of Civ. Proc.	25
Tex. Atty. Gen. Op. No. WW-1251 (1962)	17
Tex. Atty. Gen. Op. No. M-68 (1967)	19, 35
Tex. Atty. Gen. Op. No. M-562 (1970)	34
Tex. Atty. Gen. Op. No. H-220 (1974)	36, 38, 39
Mechem, Pub. Officers, Section 855	16

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, et al.,
Appellants

v.

RICHARD E. MOORE, et al., *Appellees*

**On Appeal From The United States District Court
For The Southern District of Texas,
Houston Division**

BRIEF FOR THE APPELLANTS

OPINION BELOW

The judgment order (R. 363) and opinion (R. 372) of the District Court are as yet unreported. A copy of the judgment order and of the opinion are appended hereto as Exhibits A and B, respectively.

JURISDICTION

The judgment of the District Court was entered January 30, 1974. On February 4, 1974, by order of Mr. Justice Powell, the execution and enforcement of the District Court judgment was stayed pending further order of the Supreme Court. On February 19, 1974, the Supreme Court denied the Appellees' motion to vacate Mr. Justice Powell's stay order.

Appellants' Jurisdictional Statement was filed April 3, 1974, and probable jurisdiction was noted June 3, 1974. This appeal being one from the judgment of a District Court of three judges granting a permanent injunction restraining the enforcement, operation and execution of a state statute, the jurisdiction of the Supreme Court rests on 28 U.S.C. 1253.

STATUTE INVOLVED

Article 2351½, Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, sec. 1, eff. August 30, 1965), provided as of the dates involved in this case, and presently so provides, in section (c) thereof:

> "When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that

in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant." See Exhibit C hereto for the full text of the statute.

QUESTION PRESENTED

Whether Article 2351½ (c), Vernon's Annotated Texas Civil Statutes, either facially or as applied in this case, violates the equal protection guarantee by providing that following a redistricting by a county of its justice precincts if in any such precinct there reside an excessive number of justices of the peace or constables for the limited number of such positions authorized therein, such positions shall become vacant to be filled as other vacancies?

STATEMENT

Appellants, hereinafter referred to as the Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties and responsibilities of such a unit of state government were reviewed at length by the Supreme Court in *Avery v. Midland County, Texas,* 390 U.S. 474. Among such duties and responsibilities is that set out in Article 5, Section 18 of the Texas Constitution as follows:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. *Divisions shall be made by the Commissioners Court provided for by this Constitution.* In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace.

* * *" See Exhibit D hereto for the full text of this Section.

The foregoing constitutional provision, embodied in the state's constitution ratified by the people of Texas on February 15, 1876, has been amended only once, on November 2, 1954, to the extent only of increasing the term of office of the officers in question from two to four years.

As stipulated by the parties in this cause, Harris County was last divided into the eight precincts in question in the year 1876 (Bass Deposition, p. 56). To correct the evils attendant upon the severe malapportionment among such precincts that had developed in the ensuing 97 years, the Commissioners Court on March 12, 1973, appointed a committee of nine persons to study and recommend plans for redistricting such precincts as well as the county's four commissioner precincts (Bass Deposition, p. 55). Such committee consisted of a county commissioner, a justice of the peace, a constable, a black, a chicano, a Republican, a Democrat, a woman and a University professor with expertise in working with redistricting plans (Bass Deposition, pp. 7-9 and Exhibit 1 thereto; Rankin Deposition, pp. 28-32).

A considerable number of public meetings of the committee as well as public meetings held by the Commissioners Court (Bass Deposition, pp. 30, 62-64), all of which were given wide publicity in various newspapers throughout the county (Bass Deposition, p. 64), the Commissioners Court on June 8, 1973, adopted a plan for redistricting the four county commissioner precincts which met the strict requirements of the one-man, one-vote principle of *Avery*, supra (Stipulation Exhibit 1, R. 225, and Map Exhibit No. 9). Thereafter on June 28, 1973,

the Commissioners Court adopted a plan for redistricting the county's eight justice precincts to become effective July 1, 1973 (Stipulation Exhibit 2, R. 226, and Map Exhibits 7 and 8).

The stated purposes for redistricting the justice precincts were to eliminate to as great an extent as practicable the gross population disparities existing between such precincts (Stipulation Exhibit 2, R. 226 and Bass Deposition, p. 67); to more fairly apportion the workload of justices of the peace and constables because of the equal pay received by the respective officers within each class (Elliott Deposition, pp. 9-10, 27); to redraw the precincts in such a manner as to follow ethnic patterns where possible to promote minority participation (Bass Deposition, pp. 18, 30-32); to provide a greater availability of services by authorizing a second justice in Precincts 2 through 8 which, unlike Precinct 1 which had two such positions, therefore had had only one justice (Bass Deposition, pp. 56-57; Elliott Deposition, p. 10); and to redraw the precinct lines on the basis of census tract lines (Bass Deposition, pp. 17-18).

The population counts of the eight justice precincts, before and after the redistricting (Stipulation Exhibits 10 and 11, R. 232, 243 and Map Exhibits 7 and 8), follow:

Precinct	*Before*	*After*
1	999,424	343,765
2	436,974	146,054
3	111,106	169,997
4	81,879	175,769
5	6,966	337,844
6	8,848	180,101
7	11,976	238,401
8	84,739	149,981

Because of the exceedingly small population counts of Precincts 4, 5, 6 and 7 and of their geographical contiguity prior to the realignment, as a result of the redistricting new Precinct 4 was comprised of an area formerly made up of all of old Precincts 4, 5 and 7, and portions of old Precincts 3 and 6 (R. 219 and see Exhibits E and F hereto for the geographical outlines of the eight precincts before and after the redistricting). Because of the location of their respective residences, four justices of the peace and three constables of certain of these former precincts as they existed prior to redistricting, ended up as residents of the new Precinct 4 (Bass Deposition, pp. 42-45).

Article 1.05 of Vernon's Annotated Texas Election Code (Exhibit G hereto) requires that the person holding such an office as justice of the peace or constable reside in the precinct for which such office is filled. To provide for just such a situation as occured here, i.e., when as a result of a redistricting of a county's justice precincts there are more than two justices or more than one constable ending up residing in a precinct as so changed than there are offices existing therefor, viz., two justice and one constable posts, the Texas Legislature in 1965 enacted Article 2351½, subsection (c) of which provides:

> "*When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished,* if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. *If more than one justice or constable resides within a precinct as so changed,* or if none resides therein,

> *the office shall become vacant* and the vacancy shall be filled as other vacancies; provided, however, that *in precincts having two justices,* if two reside therein, both shall continue in office, and *if more than two reside therein, both offices shall become vacant.*"

Because of the fact that following the redistricting in question, four justices of the peace and three constables of the former precincts resided in new Precinct 4, the two justice of the peace and one constable positions authorized for such precinct were vacated by reason of the foregoing statute. The Commissioners Court then, under Article 2355, Vernon's Annotated Texas Civil Statutes (Exhibit H hereto), proceeded to fill such vacancies. In filling such vacancies the Commissioners Court appointed one of the three former constables to fill the one authorized constable position (Bass Depostion, pp. 44-45), and one of the four former justices of the peace to fill one of the two authorized justice positions (Bass Deposition, pp. 43-44).

On the day that the order of redistricting was passed, June 28, 1973, one of the Appellees herein, Moore, filed suit to enjoin such action in a State District Court, which under state constitutional Article 5, Section 8 and state statutory Article 1908 (Exhibit I hereto), has appellate jurisdiction and general supervisory control over the Commissioners Court. The State Court on a hearing the following day denied a temporary injunction (R. 219).

Thereafter on July 20, 1973, and without further exhausting the State remedy thus invoked, Moore, joined by Bolton, both deposed constables, and Doering, Mahan and Zaboroski, deposed justices of the peace, together with two citizens who had resided in one or the other of the old precincts and who now reside in new Precinct 4, viz.,

Appellees Boynton and Neeley, instituted this suit in the United States District Court for the Southern District of Texas, Houston Division In response the Commissioners Court filed a Motion To Dismiss on the grounds that such suit raised no substantial federal question and that inasmuch as there was then pending in a state court a cause of action involving the same issues of fact and law, viz., the suit filed by the Appellee Moore, the District Court should abstain from deciding on the matters in controversy until the Plaintiffs had exhausted their adequate state remedy (R. 161).

The matter was heard on oral arguments only on January 30, 1974, and the Court issued its judgment order on that day (R. 363). In its Opinion issued February 8, 1974 (R. 372), the District Court delared that insofar as Article 2351½, V.A.T.C.S., operates to terminate the term of a duly elected justice of the peace or constable upon the circumstance that a redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so affected. Additionally, the District Court declared that the effect of such statute in cutting short the term of such officers also constituted an impermissible abridgement of the franchise of those voters who had been entitled to vote for them. Underlying both of these conclusions, the District Court found that no compelling state interest is served to justify such effects of the statute.

SUMMARY OF ARGUMENT

The people of Texas by their constitution have vested in the Commissioners Court of each of the state's 254 counties the responsibility to divide, and when compelling and justifying reasons call for such, to redivide from time

to time, its county into a certain number of justice precincts, not less than four nor more than eight, for the election within each of not more than two justices of the peace and one constable. Article 5, Section 18, Vern. Ann. Tex. Const. Additionally, the Legislature has prescribed that such precinct officers must be residents of the precinct in which they serve. Article 1.05, Vern. Ann. Tex. Election Code.

In this case the Commissioners Court of Harris County, pursuant to its constitutional responsibility in the face of a compelling need to redistrict the county's eight justice precincts because of their severe malapportionment, arising from the fact that they had last been apportioned in the year 1876, realigned such precincts. Because the smallest precincts were contiguous one to another prior to the realignment, the redistricting necessarily resulted in one new precinct incorporated their area which in turn resulted in there being more justices and constables of such former precincts residing in the new precinct than there were positions authorized to be filled therein.

Prior to 1965 the judicially applied law of Texas under constitutional Article 5, Section 18 was such that following such a redistricting as occurred here, all the justice and constable positions in all eight new precincts would have been considered vacant to be filled anew by appointment made by the Commissioners Court. In that year the Legislature enacted statutory Article 2351½, Vern. Ann. Tex. Civ. Stat., Section (c) of which provides that following such a redistricting a vacancy would occur only in such instances when no previously elected or appointed justice or constable resided in a new precinct, or when, as a result of the realignment there resided in a new precinct an excessive number of such officers for the posi-

tion or positions authorized therein. Otherwise, all such officers would be entitled to continue in office for the remainder of their elective or appointive terms.

In the instant case because of the fact that in new Precinct 4 following the redistricting, there were four justices of the peace and three constables of certain of the former precincts residing therein, with only two justice and one constable positions authorized to be filled, these positions were deemed vacated by the effect of Article 2351½ (c).

This statute is simply an expression of State policy providing for its own political and internal administration and is clearly within a State's power to create for purely state purposes certain local offices and when compelling and justifying reasons call for its exercise, to abolish or vacate such offices. Appellees' claimed right to continue in their offices until the expiration of their terms must give way to the public's right to have the precincts in question reapportioned from time to time and to continue to have the residents therein represented by officers who themselves reside within the respective precincts which they serve.

Additionally, a compelling reason calls for invoking the doctrine of abstention in this case. The state courts should be afforded the opportunity to determine the question of whether the offices in question are "county offices" within the meaning of the Texas constitutional requirement relating to residence. If so, only residence within the county, as distinguished from residence within the justice precincts, would be required of the officers in question and Article 2351½ (c), insofar as it attempts to make residence within the precinct a qualification for continuing in office following a redistricting, would, therefore, be

unconstitutional under the state constitution. Such a determination by the state courts would, of course, render unnecessary a federal constitutional decision under the Fourteenth Amendment.

ARGUMENT

I. THE VACATING OF THE OFFICES IN QUESTION PURSUANT TO ARTICLE 2351½(c) WAS NOT VIOLATIVE OF THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT, SINCE COMPELLING STATE INTERESTS WERE SERVED AND SINCE SUCH OFFICES ARE LOCAL OFFICES CREATED FOR PURELY STATE PURPOSES AND THEIR CREATION, REARRANGEMENT OR ABOLISHMENT FOR COMPELLING STATE REASONS RELATE SOLELY TO THE INTERNAL ADMINISTRATION OF THE STATE'S POLITICAL STRUCTURE.

> "The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution. * * * In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office." *Wilson v. North Carolina,* 169 U.S. 586, 592; *Taylor v. Beckham,* 178 U.S. 548, 573.

In *Higginbotham v. City of Baton Rouge,* 306 U.S. 535, 539, the Supreme Court, quoting from the case of

Newton v. Mahoning County Commissioners, 100 U.S. 548, 557, declared:

> ". . . 'the legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.' "

In *Snowden v. Hughes,* 321 U.S. 1, 8, the Supreme Court declared:

> ". . . . The right to become a candidate for state office, like the right to vote for the election of state officers, Minor v. Happersett, 21 Wall. 162, 170-178, 22 L.Ed. 627; Pope v. Williams, 193 U.S. 621, 623, 24 S.Ct. 573, 575, 48 L.Ed., 817; Breedlove v. Suttles, 302 U.S. 277, 283, 58 S.Ct. 205, 208, 82 L.Ed. 252, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause. * * * Nor can we conclude that the action of the State Primary Canvassing Board, even though it be regarded as state action within the prohibitions of the Fourteenth Amendment, was a denial of the equal protection of the laws. The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. * * * But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."

In *Gomillion v. Lightfoot,* 364 U.S. 339, 347, the Supreme Court declared:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal

> judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

And in *Sailors v. Board Of Education Of County Of Kent,* 387 U.S. 105, 109, the Supreme Court declared:

> ". . . . Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs."

Granted that in none of the foregoing cases was the unique factual situation confronting the Supreme Court in the instant case involved, it is nevertheless respectfully submitted that the principle enunciated in such cases clearly finds application in this case. Essentially, that principle, within the factual context of this case, is that the controversy relates exclusively to the title to certain of the state's local offices created by the state's constitution and statutes, and to the rights of persons who were elected to the offices so created. Thus in the application of Article 2351½(c) on the redistricting question, the State of Texas, acting by and through Harris County Commissioners Court, was acting solely with regard to the management of its own internal affairs and exercising power wholly within the domain of state interest.

Where then, it must be asked, did the State run afoul of a federally protected right *(Sailors),* or how was State power used in this instance as an instrument for circumventing a federally protected right *(Gomillion)*? Appellees would urge, and the District Court so held, that the effect of Article 2351½(c) on the redistricting in question, of cutting short the Appellees' terms of office while other such officers in other precincts were not so affected, in-

vidiously and irrationally discriminates against the Appellees.

Such challenge to the statute overlooks, however, the important State interest served by the precinct residency requirement of Article 1.05 of the Texas Election Code, which the Texas Legislature obviously had in mind in the enactment of Article 2351½(c). Furthermore, it overlooks the Texas courts' numerous holdings, more fully treated later in this brief, that such offices as those in question are and must be taken subject to a future necessity for changing the boundaries of the precincts and the consequent abolishment or vacating of the offices. Thus the possibility of a future redistricting and the effect of such a statute as Article 2351½(c) on the right of holders of such offices at the time such a redistricting takes place, like the qualifications for such offices, merely constitute one of the terms and conditions upon which such offices shall be sought and held by the persons seeking such offices.

As against the Appellee's claim that they were irrationally and invidiously discriminated against by reason of the effect of Article 2351½(c) cutting short their terms of office while other such officers in other precincts were not so affected, it is submitted that the overwhelming need for the redistricting in question in the first instance, which in itself gave rise to the necessity for combining several of the smallest precincts to form the specific new precinct in question to achieve some degree of reasonable apportionment, which in turn caused the excess of officers for the positions authorized therein, and the compelling state interest of requiring such precinct officers to reside in the precinct which they serve, override Appellees' equal protection claim and fully justified the vacating of the offices in question.

A. History of the Texas Law

Article 5, Section 8 of the Texas Constitution, supra, which enjoins upon the Commissioners Court of each Texas county the duty to divide, and when compelling and justifying reasons call for such, to redivide from time to time, its county into precincts, not less than four and not more than eight, for the election within each of not more than two justices of the peace and one constable, was adopted by the people of Texas in the ratification of the state's present constitution on February 15, 1876. Gammell's Laws of Texas, 1822-1897, Volume 8, page 779.

The first reported state case to pass on this provision was that of *State ex rel. Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Civ. App. 1897, application for writ of error denied by the Texas Supreme Court at 43 S.W. 1101 for the reason that the case "was correctly decided in the court of civil appeals"). The Texas court declared:

> ". . . The power to divide the county into justices' precincts is also given by the statute, but not in terms so explicit as those used in the constitution. Rev. St. 1895, art. 1537. There can be no doubt that both constitution and statute confer the power, and the only question is as to its extent. *It is contended that a limitation upon the power is found in the constitutional provision fixing the terms of office* of precinct officers; *and that, since they are to hold for two years* (now four), *it follows that the precincts cannot be changed during the terms, because the power to alter them would practically enable the court to destroy the office.* The language of the constitution expresses no such limitation. The division is to be made 'from time to time.' The reason for the division is to be the convenience of

the people; and the judge, both as to time and convenience is the court.

* * *

". . . *the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts.* This is no anomaly in our law. All county officers whose compensation is derived from perquisites, and therefore depends to some extent on the territory in which they exercise their functions, hold their offices subject to lawful power to alter that territory. *While the office is property, it is held subject to the proper exercise of all such powers as these.* There is no contract between the state and its officers which forbids such action. Mechem, Pub. Off. § 855."

In the subsequent case of *Williams v. Castleman,* 247 S.W. 263 (Tex. Sup. Ct. 1922), the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

". . . The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time,' which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.

* * *

"It is thus seen that there is no limitation on the time when the commissioners' court may divide a county into justice precincts, and that, aside from the maximum and minimum prescribed in the Constitution, there is no limitation as to number. The Constitution does not state how the power of division

by the commissioners' court shall be exercised, nor does the statute. * * * *It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."*

In the later case of *Ward v. Bond,* 10 S.W.2d 590 (Tex. Civ. App. 1928, no writ history), the Texas Court of Civil Appeals declared:

> *"That a commissioners' court has authority to change precinct lines and redistrict the county, even in part, although in doing so a justice of the peace is deprived of his office, is settled in the case of State v. Rigsby,* 17 Tex. Civ. App. 171, 43 S.W. 271. The fact that in the instant case certain candidates and commissioners who formerly lived in precincts 1, 2 and 3 have now become residents of other precincts, and that the change has resulted in putting two commissioners, who formerly lived in other precincts, in the same precinct, is no ground for annulling the order. If, as held in the Rigsby Case, *a duly elected officer has no such vested right to his office as will enable him to prevent redistricting the county, then surely a candidate, though a party nominee, has no such right."*

In 1962, the Attorney General of Texas in an advisory opinion, No. WW-1251, February 2, 1962, declared the Texas law to be as follows:

> "The Commissioners' Court may abolish old justice precincts and re-divide the county into new justice precincts at any time, so long as there is a mini-

> mum of four and not more than eight justice precincts in the county. *When such justice precincts are abolished the offices in the old precincts become vacant and the officers of the newly created justice precincts must be appointed by the Commissioners Court.*"

Upon a review of the Texas law prior to the 1965 enactment of Article 2351½(c), there can be no question that one seeking and gaining the post of either justice of the peace or constable took either of such offices subject to the power of the Commissioners Court, pursuant to the needs of the people in its county, to change the boundaries of the various justice precincts, and in so doing deprive such officers of filling out their respective terms of office. As said in *Ward v. Bond* above, such "a duly elected officer has no such vested right to his office as will enable him to prevent redistricting the county" by a Commissioners Court. Of course, the power residing in a Commissioners Court to redistrict was not, nor is now, an unbridled one. As the Texas Supreme Court declared in *Williams v. Castleman* above, the duty enjoined upon them can only be performed "so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action." To this end any aggrieved office holder whose office is vacated by reason of a redistricting can challenge such action in a Texas District Court, which under state constitutional Article 5, Section 8 and state statutory Article 1908, has "appellate jurisdiction and general supervisory control over the Commissioners Court."

When considered in the light of the pre-existing state of the Texas law, the 1965 enactment of Article 2351½

(c) was very obviously intended to ameliorate the effect of a redistricting on the vacating of offices. It was clearly intended to limit to as few as possible the number of vacancies theretofore caused by a redistricting, by requiring a commissioners court to retain in office all those officers residing in those newly-redistricted precincts which do not end up with a surplus of such officers to fill the limited number of positions authorized, keeping in mind the statutory requirement that such precinct officers must reside in the precinct which they serve. It is easily conceivable that in a redistricting which does not involve the vastly disproportionate precincts which had to be contended with in this case, no new precinct would wind up with an excessive number of officers, resulting in no vacancies occurring.

Shortly after the statute was enacted, the Attorney General of Texas in advisory Opinion No. M-68, May 8, 1967, construed section (c) to be a legislative usurpation of power constitutionally invested in a county commissioners court, declaring "that the Commissioners Court may, if they desire, effectuate a plan of succession of the type contemplated by Article 2351½(c), supra, but that their power to create vacancies or abolish offices cannot be taken away by the enactment of legislation."

Had the Commissioners Court in this case adopted the view of the Texas Attorney General and ignored the statute, their redistricting action, in effectually abolishing all eight of the former precincts, would have resulted in vacating all of the justice and constable positions in all of the eight precincts, not merely in new Precinct 4. To what then would a Fourteenth Amendment equal protection claim attach? In such case all of the justice and constables in all eight of the county's precincts would

have had their offices vacated and all, together with all of the voters residing in each of the precincts, would have been treated equally and alike.

In such event, the Appellees would have been reduced merely to the claim that having once succeeded to the state offices in question they could not be divested of same by any state action no matter how compelling the need for a reapportionment of the precincts, or failing that, that the requirement that they reside in the precinct for which the office has been created is federally untenable. It is submitted that they would fail on either ground for reasons hereinafter set out.

B. Compelling State Interests Were Served By The Redistricting And By The Application Of Article 2351½(c)

(1) The Compelling Need For Redistricting

There can be little question of the critical overriding need for the redistricting of the County's eight justice precincts. They had originally been aligned in the year 1876, not been realigned since and as a consequence had become severely malapportioned. The population counts ranged from the low figures of 6,966, 8,848 and 11,976 in Precincts 5, 6 and 7, respectively, to the high figures of 999,424 and 436,974 in Precincts 1 and 2, respectively.

Obviously, the services affordable by one justice and one constable to the residents in Precinct 2 with its population of 436,974 would on the face of it clearly seem to be grossly unequal to the same services from a like number of such officers available to the residents of Precinct 5 with its count of 6,966. Additionally, the salaries for all justices were the same in each of the precincts, as

were those for each of the constables, which in itself was unequal treatment for those officers serving in the vastly more densely populated precincts. The evils of so severe a malapportionment of precincts as existed here prior to the redistricting are self-evident.

(2) Texas' Precinct Residency Requirement: The Compelling State Interest Served By The Effect Of Article 2351½(c)

Implicitly embodied within the meaning and effect of Article 2351½(c) is Texas' long-standing requirement that precinct officers such as justices of the peace and constables reside within the respective precincts which they are elected or appointed to serve. Such requirement was initially enacted into law by the 36th Texas Legislature in the year 1919. Gammel's Laws of Texas, 1918-1919, volume 19, page 17. Such law is now embodied in Article 1.05, Vernon's Annotated Texas Election Code (appended as Exhibit G hereto).

Article 1.05 prescribes a six-months pre-election residency requirement for such offices and in the case of *Whitmarsh v. Buckley*, 324 S.W.2d 298 (Tex. Civ. App. 1959, no writ history), in which a portion of one school district was deannexed and added to another and the plaintiffs were seeking to enjoin two trustees of the reduced district from continuing to serve because they no longer resided in such district by reason of the deannexation, the Texas Court of Civil Appeals declared:

> "We think the term 'precinct' is used in a general sense to include all political units within the county, except municipal, that are less than county-wide in area. *The evident purpose of the statute is to require representation of a political unit by one who is elect-*

> *ed who resides in the unit he is to serve.* It is true that it does not deal specifically with removal from office upon cessation of residence once a person has been elected, but it would in effect be meaningless if it is interpreted as restrictive only of residence at the time of election and qualification. If it is so restricted, a person could be elected and qualify and then move out of the political unit and yet continue to act in an official capacity when he is no longer affected by the acts he performs. A statute should be liberally construed to effect the intention of the legislature. *It has ever been traditional with Texas to require representation by elective officers who are residents of the political unit for which the elected officer acts.*"

In *Hadnott v. Amos,* 320 F. Supp. 107 (1970), affirmed by the Supreme Court at 401 U.S. 968, the three-judge United States District Court for the Middle District of Alabama, in passing on a similar Alabama statute which required a twelve-month pre-election residency, *as well as residency during continuance in office,* for circuit judges of that state, declared the following:

> "The State of Alabama has a compelling state interest in exposing to the voters for a substantial period of time before election the person who will be a candidate for state circuit judge.
>
> * * *
>
> "We consider it to be of urgent importance that the voter have an opportunity to observe, learn about and appraise those who seek to be candidates for a key judicial office that touches important events and relationships of their lives and of the community in which they live. There are innumerable qualities and qualifications that are relevant."

No less important considerations apply to a Texas justice of the peace. Justice courts exercise original jurisdiction in all civil cases where the amount in controversy is two hundred dollars or less; in all cases of forcible entry and detainer, and all cases involving foreclosure of mortgages and the enforcement of liens on personal property, where the amount in controversy is within their jurisdiction; they have the power to issue writs of attachment, garnishment, and sequestration within their jurisdiction; they act as a Small Claims Court in all actions for the recovery of money, not exceeding the sum of one hundred fifty dollars; they have jurisdiction in all criminal cases involving misdemeanors for which the fine to be imposed does not exceed two hundred dollars; they have the power to issue warrants of arrest, advise an accused of his rights, set bail without restrictions as to amount; conduct examining trials, commit defendants to jail; and to take forfeiture of all bonds given for the appearance of any party at their courts, regardless of amount. Article 2385 et seq., 2460a, Vern. Ann. Tex. Civ. State.; Articles 4.11, 4.13, 15.01 et seq., Vern. Ann. Tex. Code of Crim. Proc.

In *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97 (Mich. Sup. Ct. 1971), appeal dismissed "for want of a substantial federal question" by the United States Supreme Court at 405 U.S. 950, the Michigan Supreme Court, in striking down a constitutional challenge against a city ordinance requiring that police officers reside within the City of Detroit, declared:

> "The job of a policeman does have 'natural distinguishing characteristics' from all other city employees. There is a special relationship between the community policed and a policeman. A policeman's very presence, whether actually performing a speci-

fied duty during assigned hours, or engaged in any other activity during off duty hours, provides a trained person immediately available for enforcement purposes." Also, see *Ahern v. Murphy,* 457 Fed.2d 363 (7th Cir.).

The same considerations of course apply to the Texas requirement that a constable reside within the precinct in which he serves. He, like a city policeman, is also a peace officer authorized to make arrests. Additionally, he is charged with executing all process, warrants and precepts, and attending upon the justice courts in his precinct. Article 6878 et seq. The Texas requirement that its justices and constables live within the specific precincts for which they are elected or appointed to serve is not at all unlike the federal requirement that District Judges and Marshalls reside in the districts for which they are appointed to serve. 28 U.S.C.A. 134 and 561.

In light of the foregoing reasons it is respectfully submitted that the District Court clearly erred in failing to find that the precinct residency requirement of Texas Election Code 1.05, implicit in Article 2351½(c), did indeed constitute a State interest compelling enough to justify the effect of vacating the precinct offices in question while not affecting other like offices in other such precincts.

(3) Basis for the different treatment accorded to County Commissioners on the one hand and justices of the peace and constables on the other

The District Court took the view that it was not compelling that the offices in question be declared vacant inasmuch as "the analogous section pertaining to county

commissioners, Art. 2351½(b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected." This view overlooks the fact that county commissioners in Texas, unlike justices of the peace and constables, are not officers of the particular precincts from which they are elected; they are county officers serving the entire county. Justices of the peace and constables, on the other hand, are precinct officers within the meaning of Article 1.05, Vern. Ann. Texas Election Code, appointed or elected to serve the specific particular precincts for which their respective positions have been created.

In *Childress County v. Sachse,* 312 S.W.2d 380 (Tex. Sup. Ct. 1958), the Texas Supreme Court, in a per curiam opinion refusing an application for writ of error with the notation "no reversible error," expressly approved the holding of the Court of Civil Appeals (310 S.W.2d 414) by declaring "that changes in precinct boundaries do not create a vacancy in the office of County Commissioner or deprive the incumbent of the right to hold office for the remainder of his term, even though by reason of such changes his residence is not within the precinct as redefined." That the Texas Supreme Court refused the application for writ of error with the notation "no reversible error" and found it necessary to strictly define its approval of the holding only of the Court of Civil Appeals decision is not without significance in Texas. Under Rule 483, Vernon's Annotated Texas Rules of Civil Procedure, such a notation signifies that "the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application (for writ of error) presents no error which requires reversal."

In the subsequent case of *Whitmarsh v. Buckley,* 324 S.W.2d 298 (Tex. Civ. App. 1959), discussed earlier, an action in which a portion of one school district was deannexed and added to another and the plaintiffs were seeking to enjoin two trustees, one elective and the other appointive, from continuing to serve because they no longer resided in such district by reason of the deannexation, the Texas Court of Civil Appeals, in holding that the two trustees were no longer eligible to hold their offices, declared:

> "We find nothing in our holding contrary to the case of Childress County v. Sachse, Tex. Civ. App., 310 S.W.2d 414, writ refused, n.r.e. Tex., 312 S.W. 2d 380. In that case the Court held that a county commissioner, who was no longer a resident of the precinct from which he was elected because the Commissioners Court had changed the precinct lines, did not thereby vacate his office. However, a county commissioner is merely elected from a precinct that is created for the convenience of the people under the mandate of Article 5, Section 18 of the Constitution. He is not, however, an officer of that political subdivision. He is a county officer serving the entire county as a member of the Commissioners Court, which as a body is the governing unit for the whole county. He is elected, not to act authoritatively for just his precinct. He is elected to serve the whole county. In the Sachse case, Sachse still lived in the political unit he was elected to serve, to wit, Childress County."

The holding in *Childress County v. Sachse,* supra, relating to County Commissioners, was enacted into law as Section (b) of Article 2351½. See *Villareal v. Bustamente,* 480 S.W.2d 231 (Tex. Civ. App. 1972, no writ history). It was obviously with the holdings of both

Childress County v. Sachse and *Whitmarsh v. Buckley* in the background that the Texas Legislature in enacting Article 2351½(c) distinguished between county commissioners on the one hand and justices of the peace and constables on the other, with respect to the automatic vacating of their offices based on residency following a redistricting of their respective precincts. It is submitted that the differing treatment, however harsh it may fall on one class as opposed to the other, is reasonably necessary to accomplish a legitimate state objective, viz., to insure representation of citizens within defined political units by officers who themselves reside in such units. *Whitmarsh v. Buckley; Hadnot v. Amos; Detroit Police Officers Ass'n v. City of Detroit,* supra.

(4) Necessity of effecting redistricting in mid-term.

With regard to the District Court's view that "Certainly it was not necessary to effect redistricting in mid-term," under the apparent impression that it could have been done so as to coincide with the expiration of the terms of the officers in question so that such terms would not have been cut short, it is submitted that under state constitutional Article 16, Section 65 (Exhibit J hereto), providing for the staggering of the various terms of the offices in question, *no* redistricting could ever be effected which would not cut short the term of office of at least some of the officers in question.

Article 16, Section 65 provides for staggering the terms of office of justices of single justice precincts with constables so that such justices are elected at one general election for four years and constables are elected at the following general election for four years. In the case of a two justice precinct, as was Precinct One prior to the

redistricting and as all are following the redistricting, the justice of the uneven place number, viz., No. 1, runs at one general election for four years and the justice of the even place number, viz., No. 2, runs at the following general election for four years.

With regard to the specific office holders in this case, Appellees Moore and Bolton, the deposed constables, had begun serving their terms of office on January 1, 1973, and in the absence of the redistricting in question would have continued to serve until December 31, 1976 (R. 215-216). Appellees Doering, Mahan and Zaboroski, deposed justices of the peace, began their terms of office January 1, 1971 and would have been entitled to serve until December 31, 1974 (R. 216-217).

Thus, had the Commissioners Court chosen to make the redistricting in question effective at the end of the term of office nearest in time to their decision to redistrict, being that of the justices of the peace in question, viz., January 1, 1975, the two constables in question would still have had their terms of office cut short by two years. Once the necessity for redistricting is thus determined, it really becomes immaterial to the decision maker that some officers will have their terms of office cut short, since in any event no matter when the redistricting can be made to become effective such an occurrence will of necessity result (Bass Deposition, p. 38).

In *Pate v. El Paso County, Texas,* 337 F. Supp. 95, affirmed by the Supreme Court at 400 U.S. 806, the validity of state constitutional Article 16, Section 65, insofar as it provides for the staggering of the terms of office of Texas county commissioners of even versus uneven numbered precincts was upheld on the ground that it "insures that the commissioners court have some con-

tinuity in its membership and experience, thereby providing for more efficient and effective county government" (at page 98). And see *Robinson v. Zapata County, Texas,* 350 F. Supp. 1193; *Carr v. Brazoria County, Texas,* 341 F. Supp. 155, affirmed 468 Fed.2d 950. The same considerations, of course, apply to justify the staggering of the terms of office as between justices of the peace of even versus uneven numbered positions within a precinct as well as the staggering provided for between justices and constables.

(5) Effect of vacating the offices on the voters.

The District Court also took the view that the effect of Article 2351½(c) of prematurely ending the term of office of the five officers in question constituted an impermissible abridgement of the franchise "of those entitled to vote for them;" however, in *Pate v. El Paso County, Texas,* supra, the decision of which the Supreme Court affirmed at 400 U.S. 55, the voters affected by the redistricting involved there suffered no better fate than those in this case. While the voters' complaint in *Pate* was that because of the staggering effect of Article 16, Section 65, their opportunity to vote for a county commissioner would be postponed for two years, it is clear that after the redistricting of the commissioner precincts there involved, the voters in old commissioner precinct two who were shifted to new commissioner precincts one and three would no longer be represented by the elected commissioner for whom they had been entitled to vote in the last election. The same fate was suffered by the voters in *Carr v. Brazoria County, Texas,* supra, when voters in that county's commissioner precincts one and three were transferred to precincts two and four, as well as by the voters in *Robinson v. Zapata County, Texas,* supra, in which

after the redistricting there in question, *no* voter in all of that county's old commissioner precinct 4 was any longer represented by the commissioner for whom he had been entitled to vote at the last election.

Curiously, the District Court declared that if the redistricting here involved "were thought pressing" enough to have been effected in mid-term, "it was not compelling that the office be declared vacant as a result," thus intimating that no impermissible abridgment of the franchise would have been suffered by a voter if only the officer had been permitted to retain his office, even though his new precinct territory might not coincide in any manner with his old precinct area, as was the case with old and new precincts 5 and 7.

Whether as a result of the realignment of the precincts, a voter is no longer represented by the officer he was entitled to vote for at the last election either by reason of the fact that the realignment puts him outside the new precinct in which the officer continues to serve, as in *Pate, Carr* or *Robinson,* supra, or by reason of the fact that the officer's term has been cut short by reason of the effect of Article 2351½(c), as in this case, the effect is the same on the voter. In either case after a realignment he is no longer represented by the officer or officers he had been entitled to vote for at the last election.

In any event the need to correct the severe malapportionment existing in the precincts prior to the Commissioners Court's redistricting action in this case, coupled with the compelling state interest of requiring the officers in question to reside in the precincts which they serve, which resulted in the vacancies in question, clearly override the interests of voters in any particular precinct to have the continued service of the officer or officers for whom they had been entitled to vote in the last election.

II. THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THIS CAUSE TO AFFORD THE TEXAS COURTS THE OPPORTUNITY TO DETERMINE WHETHER JUSTICES OF THE PEACE AND CONSTABLES ARE "COUNTY OFFICERS" WHOSE RESIDENCE NEED ONLY BE IN THE COUNTY, AS DISTINGUISHED FROM RESIDENCE WITHIN THE PRECINCTS, THE RESOLUTION OF WHICH IN FAVOR OF APPELLEES WOULD RENDER UNNECESSARY A FEDERAL CONSTITUTIONAL DECISION.

The validity of Article 2351½(c), under either the state or federal constitutions, has never been passed on by the Texas Supreme Court. In only one Texas Court of Civil Appeals decision has such a court been confronted with the actual application of section (c) of the statute.

In *Villareal v. Brooks County*, 470 S.W.2d 60 (Tex. Civ. App. 1971, no writ history), a justice of the peace whose office had been determined to be vacated by reason of a redistricting, like Appellees here, filed suit to determine title to the office. The trial court ruled against his reinstatement to office and on appeal, the Court of Civil Appeals declared that the evidence was conclusive that he had established a new residence within the new precinct prior to the time the redistricting became effective, and since he was the only previously elected or appointed justice living within the boundaries of the new precinct he was entitled to have continued in office for the remainder of the term to which he had been elected. His term having expired before the appellate court's decision, such officer recovered his salary from the time he was ousted from office to the date of expiration of such term.

Villareal clearly evidences the adequate state remedy available to the Appellees here, but, of especial significance to the case at hand, is what the Texas Court of Civil Appeals declared as follows:

> "In view of the disposition we have made of this case, *we do not consider appellant's contention that, since the office of justice of the peace is a county office, only residence within the county, as distinguished from residence within the justice precinct, is constitutionally required and that, therefore, Article 2351½, insofar as it attempts to make residence within the precinct a qualification for continuing in office, is unconstitutional.* Nor do we consider the contention that the order of January 13, 1969, is void as a violation of the 'one man, one vote' rule promulgated by the Supreme Court of the United States in several reapportionment cases."

Appellees in this case, like the Plaintiff in *Villareal,* have of course also advanced the contention that the offices of justice of the peace and constable are "county offices" within the meaning of Article 16, Section 14 and Article 5, Section 24 of the Texas Constitution (appended hereto as Exhibits K and L, respectively), and that, therefore, Appellees' residences need only be within the county as distinguished from residence within a specific precinct, notwithstanding the residency requirement of Article 1.05 of the Texas Election Code. Thus they contend that under the state constitution they should be treated no differently than are the county commissioners under section (b) of the statute.

If such a contention were to be upheld by the Texas Supreme Court, then Article 2351½(c), insofar as it attempts to make residence within the precinct a qualification for continuing in office following a redistricting as

occurred here, would be unconstitutional under the state constitution. Such a holding by the Texas court would of course be favorable to the Appellees and would avoid a federal constitutional decision under the Fourteenth Amendment.

With a very similar question confronting it, the United States Court of Appeals for the Fifth Circuit, in *Romero v. Coldwell,* 455 F.2d 1163, abstained from deciding whether the jurisdiction of a Texas justice of the peace was county-wide or confined to his precinct. In a class-suit seeking the application of the one-man, one-vote concept to justice precincts in El Paso County, Texas, the plaintiffs contended that a Texas justice of the peace has county-wide jurisdiction as opposed to that merely for his precinct and, therefore, one-man, one-vote should apply in the apportionment of a county's justice precincts. The United States Court of Appeals, unlike the District Court below which concluded that such jurisdiction is state-wide, citing only Texas statute Article 2385, with which conclusion Appellants strenuously disagree, exhaustively reviewed the Texas law relating to the question and concluded:

> "Clarity and unambiguity are lacking with respect to territorial jurisdiction of a Texas justice of the peace, given the disparity between C.C.P. arts. 4.12 and 45.22 which speak in terms of government units and C.C.P. art. 4.11, Tex. Rev. Civ. State. Ann. arts. 2385, 2460a, and Texas Const. art. V, § 19, all of which go to subject matter jurisdiction. *It is possible that the Texas Courts may flesh out the bare bones of the constitution and statutes by finding the boundary of the jurisdiction of a justice of the peace coincident with the precinct from which he is elected rather than county-wide.*
>
> * * *

> ". . . *thus, dismissal by the federal court is appropriate in order that the plaintiffs may proceed in the Texas courts if they wish but the dismissal must be without prejudice.* Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971)." (Emphasis supplied)

Significantly, the doctrine of abstention has now been twice invoked by federal courts in the Southern District of Texas in cases involving Article 2351½ itself, both however relating to county commissioner precinct redistricting under section (a) rather than justice precinct redistricting under section (c). *Robinson v. Zapata County, Texas,* 350 F.Supp. 1193 (Laredo Division); *Carr v. Brazoria County, Texas,* 341 F.Supp. 155 (Galveston Division), affirmed 468 Fed.2d 950.

In *Robinson,* the Court declared:

> "Before this Court sets out to determine what Article 2351½(a) really means, or decides the fate of the Commissioner of Precinct No. Four and of those voters of former Precinct No. One who did not vote for him or anyone else for that office in 1970, and will not in 1972, the Texas courts should have a chance. Harris v. Samuels, 440 F.2d 748 (5th Cir. 1971), cert. den. 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62."

In *Carr,* the Court declared:

> ". . . portions of Article 2351½ have twice been deemed void under the State Constitution in advisory opinions of the Attorney General of Texas. See Op. Atty. Gen. No. M-68 (May, 1967); Op. Atty. Gen. No. M-562 (January, 1970). Finally, although the statute has been on the books since 1965, this Court is not aware that Article 2351½(a) has ever been authoritatively construed in any reported opinion of any Texas court."

Texas Attorney General advisory Opinion No. M-68, May 8, 1967, referred to in *Carr* above, concluded:

> "Under the facts submitted, a proposed transfer of voting precincts 142 and 158 from Justice Precinct No. 2 to Justice Precinct No. 1 of Bexar County, which does not affect the residence of any of the present office holders, will not create a vacancy in any of the offices of the two precincts, but *the provisions of Article 2351½c, Vernon's Civil Statutes, for continuation in the office of the incumbents after a change in boundaries of Justice Precincts, is unconstitutional as an attempt on the part of the Legislature to control that which has been vested exclusively with the Commissioners Courts.* To the extent of their conflict with this opinion, Attorneys General's Opinions V-790 (1949), V-1032 (1950), WW-536 (1958) and C-112 (1963) are overruled."

The writer of above Texas Attorney General Opinion No. M-68 declared therein that "If a change in boundary lines of itself creates a vacancy in the office by abolishing the existing precincts, then Article 2351½(c) collides with Section 28, of Article 5 of the Texas Constitution," which, in part, provides that "vacancies in the office of County Judge and *justices of the peace* shall be *filled* by the Commissioners Court until the next general election for such offices." The Opinion further declared that "the Commissioners Courts may, if they desire, effectuate a plan of succession of the type contemplated by Article 2351½(c), supra, but that their power to create vacancies or abolish offices cannot be taken away by the enactment of legislation."

The fallacy of Opinion No. M-68, it is submitted, lies in the fact that the writer mistakenly failed to distinguish between the *filling* of vacancies when and as they occur,

the authority for which under the appropriate state constitutional provisions rests alone with a county commissioners court, and the authority for decreeing *when* vacancies will occur, the exercise of which is reflected by the Texas Legislature's enactment of Article 2351½(c). Whether for this reason or others, suffice it to say that the Texas Court of Civil Appeals in *Villareal v. Brooks County*, supra, paid no heed to advisory Opinion No. M-68, and on the basis of such case, nor did the Harris County Commissioners Court in applying the statute to the redistricting in question.

To further highlight even greater the need for a definitive decision by the Texas Supreme Court on the matter in question, the Texas Attorney General on January 29, 1974, has issued yet another advisory opinion, which, while it does not treat of Article 2351½(c) specifically, further adds to the confusion of the Texas law about the very question involved in this case. In Texas Attorney General Opinion No. H-220, January 29, 1974, the full text of which is set out as Exhibit B of Appellee Zaboroski's Motion To Dismiss Or Affirm filed in response to Appellant's Jurisdictional Statement on this appeal, it is concluded:

> "Justices of the peace and constables, elected to a full term, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice or constable not living in his precinct, does not vacate his office."

In arriving at such conclusion, the writer of the above Texas Attorney General opinion ignored altogether the provisions of Article 2351½(c), although he impliedly relied, in part, on the case of *Childress County v. Sachse*, 310 S.W.2d 414 (Tex. Civ. App. 1958, error refused,

n.r.e., Tex. Sup. Ct. at 312 S.W.2d 380), the case relating to the right of a county commissioner to continue serving after a redistricting even though his residence is outside of his precinct as redefined, and the holding of which was enacted into law as Section (b) of Article 2351½. See *Villareal v. Bustamente,* 480 S.W.2d 231 (Tex. Civ. App. 1972, no writ history).

The writer of such opinion also curiously set out and presumably in reliance thereon, Article 5, Section 24 of the Texas Constitution, which provides for the removal from office of justices of the peace and constables, among others, for "incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury." Yet, in *Lamb v. State ex rel. Johnson,* 267 S.W.2d 285 (Tex. Civ. App. 1954, no writ history), it was expressly held that a removal suit against two school district trustees, based on the allegation that they had ceased to reside in the district and had thereby vacated their offices under the effect of state constitutional Article 16, Section 14, does not lie under Article 5, Section 24 of the Texas Constitution. The Texas Court of Civil Appeals declared:

> "Perhaps the strongest argument against the view that Article 16, § 14, does not provide another cause for removal under Article 5, § 24, is that the section does not so provide in so many words. Article 5, § 24, indicates a procedure whereby an individual may be removed from public office. *Article 16, § 14, on the other hand, relates to the office primarily, rather than to the individual occupying the same. In the event a certain state of facts exists, the constitutional mandate imperatively declares the office vacant."* See *State v. Reyna,* 333 S.W.2d 832, 836 (Tex. Sup. Ct. 1960), citing *Lamb* with approval.

Additionally, the reliance placed by the writer of Opinion No. H-220 on the case of *McGuire v. Hughes,* 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history), the full opinion of which is set out as Exhibit B to Appellants' Response To Apellees' Motions To Dismiss Or Affirm in this appeal, is a wholly misconcieved one. *McGuire* did not in any way involve a redistricting of the justice precincts of the county there involved. The validity of the precinct residency requirement found in Article 1.05 of the Texas Election Code and which is implicit in Article 2351½(c), as it relates to justices of the peace and constables following a redistricting, thus did not in any manner confront the Court in *McGuire.*

The holding in *McGuire* was solely and simply that "The fact that the Commissioners Court of Grayson County abolished the Office of Justice of the Peace, Precinct 1, Place 2, in 1967, does not, in our opinion, have the legal effect of reducing the constitutional four year term of Justice of the Peace, Precinct 1, Place 1, Grayson County to two years." In so holding, the Court relied solely on the effect of state constitutional Article 16, Section 65 (Exhibit J hereto), which sets out the constitutional timetable for the terms of office of all state and county office holders in Texas.

Additionally, the *McGuire Court* could have based its holding on the fact, as pointed out in its opinion, that the precinct in question contained a city of 8,000 inhabitants, and since state constitutional Article 5, Section 18 provides that in any such precinct there *shall* be elected two justices of the peace, the commissioners court's action of abolishing one of the two justice positions was wholly without constitutional authority. See *Grant v. Ammerman,* 451 S.W.2d 777 (Tex. Civ. App. 1970, error refused, n.r.e.).

McGuire v. Hughes is thus clearly distinguishable, both on the facts and the law, from the factual situation and the legal question propounded to the Texas Attorney General in his advisory opinion No. H-220, upon which Appellees so strongly rely. It is respectfully submitted that because the writer of Texas Attorney General Opinion No. H-220 erroneously relied both on *McGuire* and state constitutional Article 5, Section 24, the conclusion of such opinion is not the law of Texas. Indeed, that it is not the law of Texas is clearly borne out by the fact that it flies in the face of not only the statute Article 2351½(c) itself, but the case of *State ex rel. Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Civ. App. 1897, approved by the Texas Supreme Court at 43 S.W. 1101), in which it was expressly declared that "the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. * * * While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action."

If in fact the conclusion of Texas Attorney General Opinion No. 220 is correct, it would render ineffectual state constitutional Article 5, Section 18 itself, under the terms of which a commissioners court is charged with the responsibility to divide and/or redivide its county into precincts, "not less than four and not more than eight." If the term of office of a justice of the peace or constable were inviolate, as the Texas Attorney General would conceive it to be, a commissioners court could never reduce the number of precincts from eight to a number not less than four no matter how compelling the needs of the people calling for such a reduction might be.

And this is necessarily so because under the staggering of the terms of such offices under state constitutional Article 16, Section 65, any reduction in the number of precincts from eight to a number not less than four, at whatever time such a reduction might occur, would necessarily cut short the terms of some of such officers in the precincts eliminated.

In *Telles v. Sample*, 500 S.W.2d 677 (Tex. Civ. App. 1973, error refused, n.r.e.), the plaintiff had been elected in the November 1972 general election as constable of precinct number one of El Paso County, Texas. In December the commissioners court ordered a redistricting effective January 1, 1973, reducing the county's justice precincts from eight to six and thereby eliminating plaintiff's position. In upholding a denial of the plaintiff's application for a mandamus to compel payment of his salary, the Court of Civil Appeals declared:

> "If the Commissioners Court has the authority to set the number of precincts at not less than four nor more than eight, it must have the authority to reduce the total number from eight to six, as was done in this instance. This necessarily means some elected officials will not be able to qualify and serve when redistricting takes place between the time of the election and the date such officials take office. But we find no constitutional or statutory time limit on when the Commissioners Court may order a redistricting plan into effect."

With regard to the specific question of whether or not justices of the peace and constables should be viewed as "county officers" within the meaning of state constitutional Article 16, Section 14, and as such be required to live only within the county as distinguished from residence within the precinct, as is expressly required by state

statute Article 1.05 of the Texas Election Code, the Texas courts should be given the opportunity to decide. In this case it is not without significance that at least one of the seven Appellees did in fact invoke his state court remedy, but abandoned it subsequently. That all of the seven Appellees could have pursued the adequate state remedy available to all in this matter is clearly borne out by the following declared by the Texas Supreme Court in the case of *Grant v. Ammerman,* 437 S.W.2d 547, 550 (Tex. Sup. Ct. 1969):

> ". . . the Commissioners Court of Harrison County, in making its June 18 order to abolish Place 1, Justice Precinct 5, was not acting under the election laws of Texas. *It was acting as the governing body of the county.* Williams v. Castleman, 112 Tex. 193, 247 S.W. 263 (1922). *The order is one which must be accorded the same consideration as the judgments of other courts.* Tarrant County v. Shannon, 129 Tex. 264, 104 S.W.2d 4 (1937); Ashburn Brothers v. Edward County, 58 S.W.2d 71 (Comm. App. 1931). *It was an order that is reviewable by the district court in the exercise of its general supervisory control over the orders of the commissioners court.* Article 5, § 8, Tex. Const.; Article 1908, Vern. Ann. Tex. Stat. Relator may seek relief in the district court. Scott v. Graham, 156 Tex. 97, 292 S.W.2d 324 (1956); Haverbekken v. Hale, 109 Tex. 106, 204 S.W. 1162 (1918); Bourgeois v. Mills, 60 Tex. 76 (1883); J. R. Phillips Investment Co. v. Road District No. 18 of Limestone County, 172 S.W.2d 707 (Tex. Civ. App. 1943, writ ref.); Rodriguez v. Vera, 249 S.W.2d 689, 692 (Tex. Civ. App. 1952)."

> "Since relator has an adequate remedy in the district court to challenge the order abolishing the office of Place 1, Justice Precinct 5, he should in-

> voke that court's jurisdiction. Brazos River Conservation and Reclamation Dist. v. Belcher, 139 Tex. 368, 163 S.W.2d 183 (1942); Glenn v. Milam, 114 Tex. 160, 263 S.W. 900 (1924); Matthaei v. Clark, 110 Tex. 114, 216 S.W. 856 (1920)."

Significantly, the aggrieved party in *Grant v. Ammerman* above, did in fact pursue his remedy in a state district court and on appeal was granted the relief which he sought. *Grant v. Ammerman,* 451 S.W.2d 777 (Tex. Civ. App. 1970, error refused, n.r.e.).

It is, therefore, submitted that the Appellees herein had an adequate state remedy, which though invoked by one of them and later abandoned, is still available to all. Such remedy, if pursued, would ultimately afford the Texas Supreme Court the opportunity to decide the question of whether or not justices of the peace and constables, like county commissioners under section (b) of Article 2351½, are "county officers" whose residences need only be within the county as distinguished from residence within a precinct. A state court decision so decreeing same would render Article 2351½(c), insofar as it attempts to make residence within the precinct a qualification for continuing in office following a redistricting, unconstitutional under the state constitutional provision Article 16, Section 14. Inasmuch as such a state decision would resolve the question on this appeal favorable to the Appellees, and thereby render unnecessary a federal constitutional decision under the Fourteenth Amendment, it is submitted that the District Court should have abstained from deciding this cause under the principles laid down in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, as was done in *Romero v. Coldwell, Carr v. Brazoria County, Texas* and *Robinson v. Zapata County, Texas,* supra.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and judgment here entered in favor of the Harris County Commissioners Court, Appellants; in the alternative, it is respectfully urged that the judgment of the Court below be reversed and remanded with directions that the District Court enter a judgment of dismissal on the ground of abstention, without prejudice to the Appellees to reenter the federal forum once they have exhausted proceedings in the Texas courts.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

By Edward J. Landry
EDWARD J. LANDRY
Senior Assistant County Attorney

By Michael R. Davis
MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151

Attorneys for Appellants

CERTIFICATE OF SERVICE

1) The undersigned counsel for the Appellants do hereby certify that on this 12th day of July, 1974, they did deposit in the United States Mail, by Certified Mail, Return Receipt Requested, addressed to each of the following Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Brief For The Appellants."

JOHN G. GILLELAND
Attorney in Charge
For Plaintiffs, Richard E. Moore, et al
500 Houston Bar Center Building
Houston, Texas 77002

VIRGIL H. BARFIELD
Of Counsel
For Plaintiffs, Richard E. Moore, et al
500 Houston Bar Center Building
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
Attorney in Charge
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

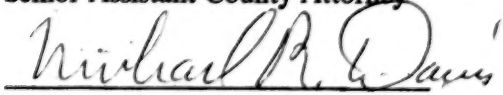
GERALD A. WOOLF
Of Counsel
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

LARRY B. KERFOOT
Attorney in Charge
For Plaintiff Blackie Neeley
910 Houston Bar Center Bldg.
Houston, Texas 77002

(2) All parties required to be served have been served.

Signed:

EDWARD J. LANDRY
Senior Assistant County Attorney



MICHAEL R. DAVIS
Assistant County Attorney

Attorneys for Appellants

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A —Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 2351½, Vernon's Annotated Texas Civil Statutes

Exhibit D — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit E — Precinct Map before redistricting

Exhibit F — Precinct Map after redistricting

Exhibit G — Article 1.05, Vernon's Annotated Texas Election Code

Exhibit H — Article 2355, Vernon's Annotated Texas Civil Statutes

Exhibit I — Article 1908, Vernon's Annotated Texas Civil Statutes

Exhibit J — Article 16, Section 65, Vernon's Annotated Texas Constitution

Exhibit K — Article 16, Section 14, Vernon's Annotated Texas Constitution

Exhibit L — Article 5, Section 24, Vernon's Annotated Texas Constitution

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos, 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decison having been duly rendered.

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S. C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

1. Tex. Const. Art. 5, §18.

> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices.

These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statewide effect and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Ownes,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

2. E.g. Arts. 2835, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *Whjte v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

---

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commissioners precincts are changed, the terms of office of the commissioners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable

resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

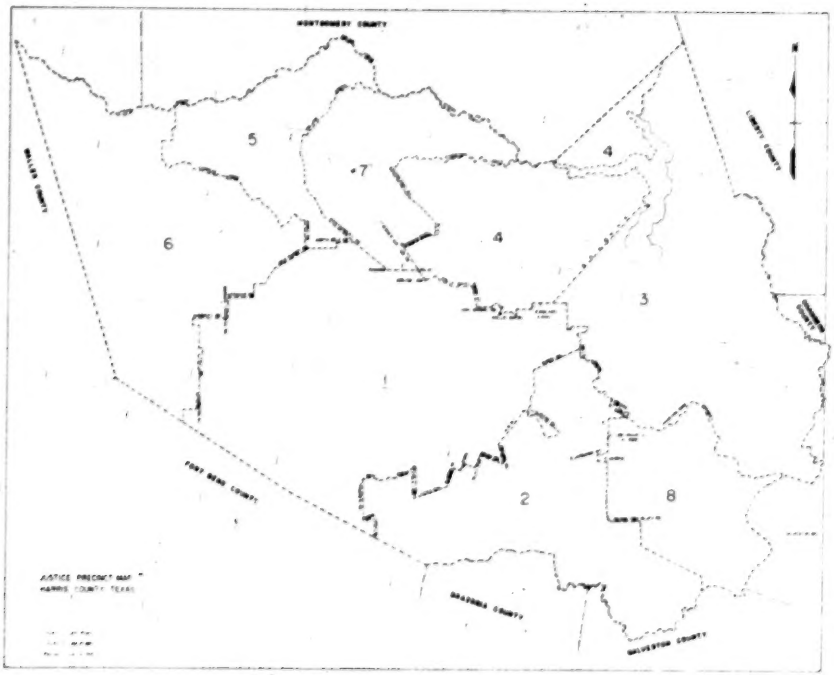
EXHIBIT D

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

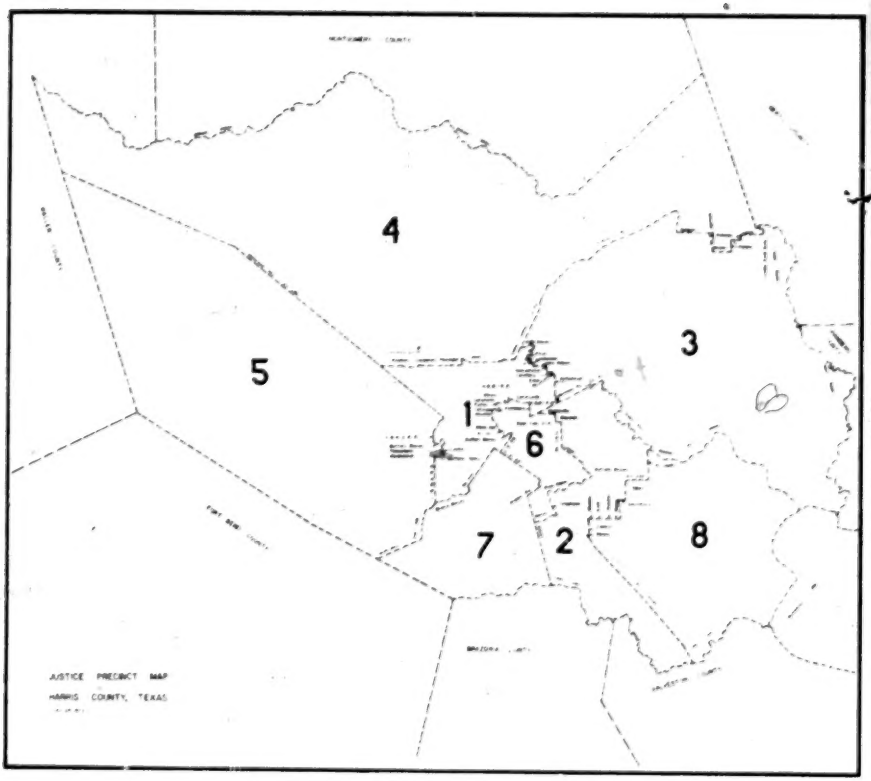
EXHIBIT E



BEFORE REDISTRICTING

Precinct	Population
1	999,424
2	436,974
3	111,106
4	81,879
5	6,966
6	8,848
7	11,976
8	84,739

EXHIBIT F



AFTER REDISTRICTING

Precinct	Population
1	343,765
2	146,054
3	169,997
4	175,769
5	337,844
6	180,101
7	238,401
8	149,981

EXHIBIT G

TEXAS ELECTION CODE

Art. 1.05. Ineligibility

No person shall be eligible to be a candidate for, or to be elected or appointed to, any public office in this state unless he is a citizen of the United States eligible to hold such office under the Constitution and laws of this state and is under none of the disabilities for voting which are stated in Article VI, Section 1 of the Constitution of Texas on the date of his appointment or of the election at which he is elected, and unless he will have resided in this state for a period of twelve months next preceding the applicable date specified below, and for any public office which is less than statewide, shall have resided for six months next preceding such date in the district, county, precinct, municipality or other political subdivision for which the office is to be filled:

(1) For a candidate whose name is printed on the ballot for a general (first) primary election, the applicable date is the last day on which any candidate for the office involved could file his application to have his name printed on the ballot for that primary election.

(2) For an independant or nonpartisan candidate in a general or special election, the applicable date is the last day on which the candidate's application for a place on the ballot could be delivered to the appropriate officer for receiving the application.

(3) For a write-in candidate, the applicable date is the day of the election at which the candidate's name is written in.

(4) For a party nominee who is nominated by any method other than by primary election, the applicable date is the day on which the nomination is made.

(5) For an appointee to an office, the applicable date is the day on which the appointment is made.

The foregoing requirements shall not apply to any office for which the Constitution or statutes of the United States or of this state prescribe qualifications in conflict herewith, and in case of conflict the provisions of such other laws shall control.

Except as provided in Section 104 of the code, no ineligible candidate shall ever have his name placed upon the ballot at any primary, general or special election. No ineligible candidate shall ever be voted upon nor have votes counted for him at any such primary, general or special election for the purpose of nominating or electing him, but votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election. No person who advocates the overthrow by force or violence or change by unconstitutional means of the present constitutional form of government of the United States or of this state, shall be eligible to have his name printed on any official ballot in any general, special or primary election in this state.

Amended by Acts 1967, 60th Leg., p. 1861, ch. 723, § 4, eff. Aug. 28, 1967.

EXHIBIT H

ARTICLE 2355—Power of Commissioners Court to fill vacancies

The Court shall have power to fill vacancies in the office of: County Judge, County Clerk, Sheriff, County Attorney, County Treasurer, County Surveyor, County Hide Inspector, Assessor of Taxes, Collector of Taxes, Justices of the Peace, Constables, and County Superintendent of Public Instruction. Such vacancies shall be filled by a majority vote of the members of said Court, present and voting, and the person chosen shall hold office until the next general election.

Const. art. 8, sec. 9; Amendment 1899. Amended by Acts 1927, 40th Leg., 1st C.S., p. 248, ch. 90, § 1.

EXHIBIT I

ARTICLE 1908—Jurisdiction of State District Court over Commissioners Courts

Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law.

EXHIBIT J

ARTICLE 16, TEXAS CONSTITUTION

§ 65. Transition from two year to four year terms of office

Sec. 65. Staggering Terms of Office—The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for "Place No. 1," "Place No. 2," etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the

designation of their office is an uneven number, and for a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. As amended Nov. 4, 1958.

EXHIBIT K

ARTICLE 16, TEXAS CONSTITUTION

Sec. 14. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

EXHIBIT L

ARTICLE 5, TEXAS CONSTITUTION

Sec. 24. County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

SUPREME COURT, U. S.

FILED
AUG 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

BRIEF FOR THE APPELLEES

JOHN G. GILLELAND
VIRGIL H. BARFIELD
723 Main Street, Suite 500
Houston, Texas 77002
(713) 222-6127
Attorneys for Appellees, Richard E. Moore, J. C. Bolton, Vernon Doering, J. W. Mahan, and John Boynton

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Order and Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	4
Statement	4
Summary of Argument	7
I. History of the Texas Law Regarding Justices of the Peace and Constables	9
II. Federal Constitutional Guarantees are Offered When the State Statute in Question is Applied	14
III. The District Court Acted Correctly in Refusing to Apply the Abstention Doctrine Below	24
IV. No Adequate Remedy Exists for Appellees Under Texas Law	32
Conclusion	34
Certificate of Service	35
Appendix Index	37

LIST OF AUTHORITIES

CASES	Page
Avery v. Midland County, Texas, 88 S.Ct. 1114	5, 17, 18
Baker v. Carr, 82 S.Ct. 691 (1962)	28
Bates v. City of Little Rock, 80 S.Ct. 412	21, 22
Brown v. Meeks, 96 S.W.2d 839 (Tex. Civ. App. 1936, error dismissed)	13
Carrington v. Rash, 85 S.Ct. 775 (1965)	20, 21
Davis v. Mann, 84 S.Ct. 1441	20
Ehlinger v. Rankin, 29 S.W. 241 (1895)	9
Ex rel. Dowlen v. Rigsby, 43 S.W. 1101 (Tex. S.Ct. 1897)	11, 13
Gray v. Sanders, 83 S.Ct. 801	17
Hastings v. Townsend, 136 S.W. 1143 (Tex. Civ. App. 1911, no writ history)	13
Maryland Casualty Company v. Pacific Coal & Oil Co., 61 S.Ct. 510 (1941)	26
Massachusetts v. Burkhart, 207 F.Supp. 885, 893	17
Mayor of Savannah v. Savannah Distributing Co., Inc., 43 S.E.2d 704	15

CASES

	Page
McLaughlin v. State of Florida, 85 S.Ct. 283	21
Meredith v. Sharp, 256 S.W.2d 870 (Tex. Civ. App. 1953, error refused, n.r.e.)	13
N.A.A.C.P. v. Alabama ex rel. Flowers, 1964, 84 S.Ct. 1302	22
N.A.A.C.P. v. Bennett, 79 S.Ct. 1192	26, 27
N.A.A.C.P. v. Button, 1963, 83 S.Ct. 328	22
Powell v. State of Alabama, 53 S.Ct. 55	22
Railroad Commission of Texas v. Pullman Company, 61 S.Ct. 643	25, 26
Reynolds v. Sims, 84 S.Ct. 1362	20, 22
Roman v. Sincock, 84 S.Ct. 1449	20
Schneider v. State of New Jersey, Town of Irvington, 60 S. Ct. 146	21
Shelton v. Tucker, 1960, 81 S.Ct. 247, 252	23, 24
Snyder v. Com. of Massachusetts, 54 S.Ct. 330	21
State v. Erickson, 225 Iowa 1261, 282 N.W. 728	15
State v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897)	12
United States v. State of Alabama, 252 F.Supp. 95-104 (1966)	22
United States v. Texas, 252 F.Supp. 234 (W.D. Tex.), affirmed 384 U.S. 155 (1966)	20
Wesberry v. Sanders, 84 S.Ct. 535	20, 22
Williams v. Castleman, 247 S.W. 263 (Tex. S.Ct. 1922)	11, 12, 13
Younger v. Harris, 91 S.Ct. 746 (1971)	26
Zwickler v. Koota, 88 S.Ct. 391 (1967)	26

UNITED STATES CONSTITUTION

Fourteenth Amendment 19, 23, 28

UNITED STATES STATUTES

28 U.S.C.A. 1343, 2201 and 2281	4
42 U.S.C.A. 1983	4

TEXAS CONSTITUTION

Article 5, Section 18 ..... 5, 8, 9, 10
Article 5, Section 24 ..... 11, 14, 15
Article 16, Section 14 ..... 10, 14, 15

VERNON'S ANNOTATED TEXAS ELECTION CODE

Article 1.05 ..... 28, 29, 30, 31

VERNON'S ANNOTATED TEXAS CIVIL STATUTES

Article 2351½ ..... cited throughout brief

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

---

BRIEF FOR THE APPELLEES

ORDER AND OPINION BELOW

A copy of the judgment order issued January 30, 1974, by the three judge United States District Court for the Southern District of Texas, Houston Division, is appended hereto and marked Exhibit A. A copy of the written opin-

ion of the court, filed February 8, 1974, is appended hereto and marked Exhibit B. Both the judgment order and opinion of the District Court are as yet unreported.

JURISDICTION

The judgment of the District Court was entered January 30, 1974. On February 4, 1974, upon motion duly made by Appellants, Mr. Justice Powell entered his order staying the execution and enforcement of the District Court judgment pending further order of the Supreme Court.

On February 19, 1974, the Supreme Court denied the Appellees' motion to vacate Mr. Justice Powell's stay order.

Appellants' jurisdictional statement was filed April 3, 1974, and thereafter on May 10, 1974, the Appellees filed their motion to dismiss and on June 3, 1974, probable jurisdiction was noted by the Supreme Court.

This appeal is one from the judgment of a three judge United States District Court for the Southern District of Texas, Houston Division, entering a declaratory judgment and granting a permanent injunction restraining the enforcement, operation and execution of a State statute.

STATUTE INVOLVED

Article 2351½, Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, sec. 1. eff. August 30, 1965), provided as of the dates involved in this case, and presently so provides:

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commissioners precincts are changed, the terms of office of the commissioner then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and

the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

QUESTION PRESENTED

Whether Article 2351½ (c), Vernon's Annotated Texas Civil Statutes, either facially or as applied in this instance, violates the due process clause and the equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT

This suit was brought by Appellees, under 28 U.S. C.A. 1343, 2201 and 2281; and 42 U.S.C.A. 1983 and 1985 (3), seeking to have declared unconstitutional a Texas Statute, viz., Article 2351½(c), and to have set aside an order of Appellants, the Harris County Commissioners Court, redistricting the eight justice of the peace and constable precincts, pursuant to the authority granted by Article 2351½(c), which order, by reason of the effect of the statute, vacated the offices of five Appellees, all of whom had been previously elected, three of whom were justices of the peace and two of whom were constables. The terms of office of the three Appellee justices of the peace expire at midnight on the 31st day of December, 1974. The terms of office of the two Appellee constables expire at midnight on the 31st day of December, 1976.

Appellee, John Boynton, a citizen resident of old justice of the peace Precinct No. 7, joined in the suit as a repre-

sentative of the class of citizens whose constitutional rights had allegedly been violated by the order of the Appellants on June 28, 1973.

The Appellants, the Harris County Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties of a commissioners court under Texas law were reviewed at length in *Avery v. Midland County, Texas,* 88 S.Ct. 1114. One of their duties is to redistrict the justice of the peace and constable precincts "from time to time, for the convenience of the people". This authority is set out in *Article 5, Section 18, of the Texas Constitution.* (See Exhibit C).

On January 12, 1973, the Appellants appointed a nine member committee to study and recommend to them new boundaries for the eight justice of the peace and constable precincts of the County. After several public meetings, various plans were considered and submitted to Appellants for consideration. On June 28, 1973, Appellants disregarded all plans submitted by the redistricting committee and adopted a plan submitted by Mr. Tom Bass, one of the Appellants herein. The "Bass" plan, as it became known, was adopted by Appellants and placed into effect three days after its adoption.

The stated purposes for redistricting the justice of the peace and constable precincts were to eliminate the gross population disparities existing between such precincts; to make the offices more convenient to all of the people of the county; and to draw new precinct boundaries along ethnic or racial lines so as to assure the election of minorities to the offices of justice of the peace and constable in the future. The main consideration as contended by Appellants for redistricting was that the gross

population disparity of the various precincts created a compelling state interest to bring about redistricting of the said justice of the peace and constable precincts.

On June 28, 1973, the day that the order of redistricting was passed by Appellants, one of the Appellees herein, Richard E. Moore, filed suit to enjoin such action in a state district court, alleging therein that the authority of Article 2351½(c) offended the laws and the Constitutions of the State of Texas and of the United States. The state court on a hearing of said petition for a temporary injunction denied said application on June 29, 1973. Thereafter, on the same date, Petitioner therein and Appellee herein, Richard E. Moore, in agreement with Appellants, took a non-suit in said State District Court action. (Stipulations of evidence, p. 5, item 20).

Following redistricting, four justices of the peace and three constables of former precincts resided in new Precinct 4, all offices of the four justices of the peace and the three constables were declared vacant pursuant to the provisions of Article 2351½(c). Afterwards, Appellants filled the vacancies in new Precinct 4 with one former justice of the peace and the other justice of the peace vacancy was filled by appointing a person of Appellants' choice who had never been elected to the office of justice of the peace. The constable vacancy in new Precinct 4 was filled by the appointment of one of the three former constables.

Inasmuch as all parties to the cause of action pending before the three judge District Court had filed and agreed to stipulations of evidence concerning said suit, the matter was heard on oral arguments only on January 30, 1974, and the Court issued its judgment order on that day, declaring as follows:

"1. The Court has jurisdiction under Title 28, U.S.C.A. Section 2281.

2. The Texas statute Article 2351½, Vernon's Annotated Texas Civil Statutes, is facially unconstitutional.

3. The order of the Commisisoners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined." (See Exhibit A.)

In its opinion issued February 8, 1974, the Court made the following findings:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected justice of the peace or constable upon the circumstance that a convenience redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so affected."

and,

> "That the effect of such statute in cutting short the terms of such officers constitutes an impermissible abridgment of the franchise of those voters who had voted for them or who had been entitled to vote for them."

In addition, *the Court, after hearing all the evidence, stipulations and arguments of counsel, found that no compelling state interest is served to justify such effects of the statute.*

SUMMARY OF ARGUMENT

The present Constitution of Texas became effective on the 1st day of January, 1876. Article 5, Section 18 of

that document (see Exhibit C) provides for as few as four and as many as eight justice of the peace precincts within each of the 254 counties of the state.

Article 5, Section 18 of the Texas Constitution, (see Exhibit C), and the interpretations of that provision by the Supreme Court of Texas in the cases of *Ex rel. Dowlen v. Rigsby, supra,* and *Williams v. Castleman, supra,* which established the law in 1897 that under the provisions of the foregoing Article 5, Section 18 of the Texas Constitution, (see Exhibit C), when an order for redistricting the justice of the peace and constable precincts goes into effect, the old precincts and precinct offices cease to exist and the new precincts and precinct offices come into existence with the offices vacant.

To make less severe some of the effects of the *State ex rel Dowlen v. Rigsby* case, *supra,* and the *Williams v. Castleman* case, *supra,* the Legislature of Texas adopted Article 2351½(c), (see Exhibit F.) Since its passage in 1965 up to the present time, it has been the law of Texas and was the law under which Appellees were removed from office on June 28, 1973, by Appellants.

The statute in question herein when applied, treats members of the same legislative class differently; it authorizes the removal of an elected official from office, without cause, prior to the expiration of their terms of office with the effect that it arbitrarily, invidiously, and irrationally discriminates against the elected official who is removed from office without cause and the voters who voted for him or were entitled to vote for him.

The application of Article 2351½ (c) to the facts herein, in an attempt to effect a mere voluntary convenience redistricting, could have been accomplished by Appellants

without the drastic effect of removing Appellees from office; the action could have been sustained in the Texas Courts if Appellants had entered its order pursuant to the authority of Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and the interpretation of this provision by the Court of Civil Appeals of Texas in *Ehlinger v. Rankin,* 29 S.W. 241, (1895).

No compelling state interest exists herein which would justify the legislative abridgment of the fundamental rights of Appellees as guaranteed by the Fourteenth Amendment to the Federal Constitution inasmuch as the redistricting done herein was voluntary and not mandatory.

Article 2351½ (c), (see Exhibit F), is not fairly subject to an interpretation by a State Court which will avoid or modify the federal questions involved and, therefore, the District Court below properly refused to apply the Doctrine of Abstention and entered its order and findings that Article 2351½ (c), (see Exhibit F), arbitrarily, irrationally and invidiously discriminated against the Appellees when said statute was applied.

I.

HISTORY OF THE TEXAS LAW REGARDING JUSTICES OF THE PEACE AND CONSTABLES

The present Constitution of Texas was adopted in 1875 and became effective January 1, 1876. This instrument was in effect at the time this controversy arose and it remains in effect to the present.

The elective offices of justice of the peace and constable are creatures of the State Constitution. Article 5,

Section 18 of the Texas Constitution, (see Exhibit C) authorizes the creation of the offices and as few as four and as many as eight such precincts are permitted for each of the 254 counties of Texas.

Once the offices were created by the various commissioners courts, Article 5, Section 28 of the Texas Constitution provides for the filling of the vacancies that exist at creation. This provision is as follows:

Article 5, Section 28, Texas Constitution.

Section 28. Vacancies in judicial offices

> Sec. 28. Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Court shall be filled by the Governor until the next succeeding general election; and vacancies in the office of County Judge and justices of the peace shall be filled by the Commissioners Court until the next general election for such offices. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

When making a determination of the residential requirements of the holders of the office of justice of the peace and constable, both county offices, Article 16, Section 14 of the Constitution provides as follows:

Article 16, Section 14, Texas Constitution.

Section 14. Civil officers; residence; location of offices

> Sec. 16. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

Being practical, the framers of the Constitution realized that at some future time, a holder of the office of justice of the peace or constable might need to be removed from office prior to the expiration of his term of office and they inserted the provisions for removal from office in Article 5, Section 24 of the Texas Constitution, which provides as follows:

Article 5, Section 24, Texas Constitution.

Section 24. Removal of County Officers

> Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Thus, the four provisions in the Constitution as outlined in the preceding paragraphs provide for the creation of the office; filling vacancies that exist in the office; determination of the residential requirements during tenure of the office; and, how to remove a holder of the office prior to the expiration of his office.

Prior to the adoption of Article 2351½(c), the courts of Texas had long followed the rule that upon the effective date of a redistricting order, the old precincts and precinct offices ceased to exist, and as of that date, new precincts came into existence with the precinct offices vacant. *State ex rel Dowlen v. Rigsby*, 43 S.W. 1101 (Tex. S.Ct. 1897); *Williams v. Castleman*, 247 S.W. 263 (Tex. S.Ct. 1922).

In *State v. Rigsby*, 43 S.W. 271 (Tex. Civ. App. 1897), decided twenty-one (21) years after the adoption of the present Texas Constitution, of which the Texas Supreme Court in a memorandum decision at 43 S.W. 1101 (1897), adopted the decision of the Court of Civil Appeals as the law of the State in the matter described therein. In the *Rigsby* case, *supra*, Rigsby, a justice of the peace, sought reinstatement to office after being ousted from office because of realignment of the boundaries by the commissioners court. The Court in denying relief to the ousted elected official Rigsby, declared:

> ". . . the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action. Mechem, Pub. Off. Sec. 855."

In the subsequent case of *Williams v. Castleman, supra*, the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

> ". . . The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time', which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.
>
> "It is thus seen that there is no limitation on the time when the commissioners' court may divide a

> county into justice precincts, and that, aside from the maximum and minimum prescribed in the Constitution does not state how the power of division by the commissioners' court shall be exercised. It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."

The holdings of *State ex rel Dowlen v. Rigsby, supra,* and *Williams v. Castleman, supra,* have been unanimously adhered to by the Texas courts in the following cases: *Hastings v. Townsend,* 136 S.W. 1143 (Tex. Civ. App. 1911, no writ history); *Brown v. Meeks,* 96 S.W.2d 839 (Tex. Civ. App. 1936, error dismissed); *Meredith v. Sharp,* 256 S.W.2d 870 (Tex. Civ. App. 1953, error refused, n.r.e.).

In 1965, the Texas Legislature sought to minimize the more harsh effects of *State ex rel Dowlen v. Rigsby, supra,* and *Williams v. Castleman, supra,* and adopted the State Statute in question, Article 2351½(c).

Pursuant to the provisions of Article 2351½(c), the Appellants entered their order redistricting all justice of the peace and constable precincts in Harris County, Texas, on June 28, 1973. The effect of Appellants' order declared a vacancy in the offices of five of the Appellees and automatically removed them from offices to which they had been elected, without cause, prior to the expiration of their terms of office.

II.

FEDERAL CONSTITUTIONAL GUARANTEES ARE OFFENDED WHEN THE STATE STATUTE IN QUESTION IS APPLIED

A. The due process clause and the equal protection guarantee of the Fourteenth Amendment of the Federal Constitution are offended when the office of an elected official is automatically declared vacant upon a mere convenience redistricting which removes an elected official from office, without cause, prior to the expiration of the term of office, when

(1) The law is applied differently to members of the same class.

Article 5, Section 24, of the Texas Constitution provides as follows:

Section 24. Removal of County Officers.

> Section 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Article 16, Section 14, of the Texas Constitution contains the following provisions:

Section 14. Civil Officers; Residence; Location of Offices.

> Section 14. All civil officers shall reside within the state; and all district or county officers within their

districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

By viewing Article 5, Section 24, of the Texas Constitution, it is readily seen that the Constitution has classified various elected officials as county officers, including justice of the peace and constables.

Article 16, Section 14, of the Texas Constitution further enumerates such classification of elective officials in Texas as either civil officers with statewide jurisdiction, district officers with district jurisdiction comprised of one or more counties and county officers, whose jurisdiction extends only within the boundaries of the county.

The authorities approving legislative or constitutional classification are so universally established that no citations are given herein. However, the criterion established for class legislation is fairly stated in *State v. Erickson,* 225 Iowa 1261, 282 N.W. 728. The test as to meeting the requirements of due process being whether the law operates equally upon all who come within the class so affected, embracing all persons who are or may be in like situations or circumstances and; the Constitution is offended where a public law is applied differently to different persons under the same or similar circumstances. *Mayor of Savannah v. Savannah Distributing Co., Inc.,* 43 S.E.2d 704.

To fulfill the requirements of due process, the law must be applied so that it operates equally upon all who come within the class so affected. By viewing Article 2351½(c), it is obvious that this statute fails to meet

the test of due process when applied to legislative classification.

This case is a simplified example of Article 2351½(c) failing to meet the requirements of due process, to-wit:

The Appellees justices of the peace and constables were removed from office by the application of Article 2351½(c), *simply because of where they resided after redistricting*, while the justices of the peace and constables in old and new Precincts 1, 2, 3 and 8 remained in office *simply because of where they resided after redistricting*, a variance of 180 degrees.

In addition to Article 2351½(c), failing to meet the test for due process for the reasons set out in the preceding paragraphs, the test of due process is not met when comparing Article 2351½(c), with Article 2351½(b), (see Exhibit F). The latter guarantees the continuation in office of a county commissioner, who is also a county officer, when the commissioner precincts are redistricted even though he no longer resides in the precinct from which he was elected. While Article 2351½(c) provides for the removal of justices of the peace and constables, who are classed as county officers, when redistricting occurs and he no longer lives in the precinct from which he was elected. Thus, again, the law fails to be applied evenly to members of the same class.

Article 2351½(c), therefo. invidiously and irrationally discriminates against one elected official upon the circumstance that a mere convenience redistricting places him in a district with others thereby removing him from office, while others, of the same class are not so affected, and the due process clause of the Fourteenth Amendment is violated thereby.

(2) Malapportioned precincts after redistricting.

The right to have one's vote count as equal to that of another is a basic constitutional principle. *Gray v. Sanders,* 83 S.Ct. 801, *Massachusetts v. Burkhart,* 207 F. Supp. 885, 893.

In *Avery v. Midland County, Texas, supra,* the Court applied the principles that apply in this instance, to-wit:

A. That a state's political subdivision must comply with the Fourteenth Amendment.

B. The Fourteenth Amendment forbids election of local governmental officials from districts of disparate population.

C. The Equal Protection Clause reaches exercise of state power however manifested, whether exercised directly or through subdivision of the state.

D. City, town or county may no more deny equal protection of the law than it may abridge freedom of speech, establish official religion, arrest without probable cause, or deny due process of law.

E. When state delegates law making power to local government and provides for election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have right to equally effective voice in election process.

PRECINCT POPULATION EXHIBIT

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in

population and the remainder of the precincts after redistricting, are as follows:

Pct. No.	Population Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.

A careful review of the preceding exhibit reveals that the requirements of the *Avery* case, *supra,* have not been met. It is clearly shown therein that after redistricting the precincts on June 28, 1973, new Precincts Nos. 1 and 5 had more than twice the number of residents of new Precincts Nos. 2 and 8. A vote cast by a citizen-voter in Precinct Nos. 2 or 8 for a justice of the peace or constable would count two and one-thirds (2-1/3) times more than a vote cast by a citizen-voter in new Precincts Nos. 1 and 5 for the same offices.

Applying the test of "convenience of the people" to the redistricting of June 28, 1973, it certainly would not be

as convenient for a resident of new Precinct No. 4 which contains in excess of 593 square miles, or approximately one-third (1/3) of the total county area, inside its boundaries, as it would be for residents of new Precinct No. 6, which contains only 32 square miles within its boundaries.

While the Court was concerned with the mandatory redistricting of units of local government with general governmental powers in the *Avery* case, *supra,* their holding therein equally applies to units of local government with non-general governmental powers when a redistricting is undertaken voluntarily pursuant to a state statute. While the Court would not compel such a unit of government to redistrict mandatorily pursuant to the requirements of *Avery, supra,* the Court should compel the application of the requirements of the *Avery* case, *supra,* when such units are redistricted voluntarily pursuant to a state statute; to do otherwise would permit an impermissible abridgement of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The failure to apply the one man - one vote principle in this case with resulting malapportioned precincts for justices of the peace and constables, who are paid from the general treasury of the county and whose jurisdiction is county wide, *arbitrarily, invidiously* and *irrationally* discriminates between a citizen-voter of one justice of the peace and constable precinct and a citizen-voter of another justice of the peace and constable precinct whose vote is 2 and 1/3 times greater.

B. The rights of the electorate, as guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution, are offended when an elected official for whom they voted or for whom they are entitled to vote is removed from office, without cause, prior to the expiration of his term of office for which he was elected.

In *United States v. Texas,* 252 F. Supp. 234 (W.D. Tex.) affirmed by the Supreme Court at 384 U.S. 155 (1966) the Court said:

> "It cannot be doubted that right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause."

The reapportionment cases, *Reynolds v. Sims,* 84 S.Ct. 1362; *Davis v. Mann,* 84 S.Ct. 1441; *Roman v. Sincock,* 84 S.Ct. 1449; and others, and the decision in *Carrington v. Rash,* 85 S.Ct. 775 (1965), require a recognition that today voting is the most important means of participating in our democratic society. Recognition of this is implicit in the declaration of the Supreme Court in *Reynolds v. Sims, supra,* that:

> "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

There is similar language in *Wesberry v. Sanders,* 84 S.Ct. 535:

> "No right is more precious in a free country than that of having a voice in the election of those who

> make the laws under which * * * we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Even though not specifically mentioned in the Constitution, the right to vote clearly constitutes one of the most basic elements of our freedom—the "core of our constitutional system." *Carrington v. Rash,* 1965, *supra*:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."

As stated by the Supreme Court, *fundamental personal liberties may not be abridged by the States* simply on a showing that a regulatory statute had some rational relationship to the effectuation of a proper state purpose:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. City of Little Rock,* 80 S.Ct. 412.

The law must be shown,

> "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. State of Florida,* 85 S.Ct. 283. See *Schneider v. State of New Jersey, Town of Irvington,* 60 S.Ct. 146.

To determine whether a right is protected by the due process clause, a court must look to the,

> "traditions and (collective) conscience of our people" to determine whether a principle is "so rooted (there) * * * as to be ranked as fundamental." *Snyder v. Com. of Massachusetts,* 54 S.Ct. 330.

The inquiry is whether a right involved,

> "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *." *Powell v. State of Alabama,* 53 S.Ct. 55.

When measured against these standards and examined in the light of Supreme Court pronouncements describing it as our most "precious" right, *Wesberry v. Sanders,* 1964, 84 S.Ct. 526, and as the "essence of a democratic society," *Reynolds v. Sims,* 1964, *supra,* it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.

The term abridged as is used in *Bates v. City of Little Rock,* 80 S.Ct. 412, is further defined in *United States v. State of Alabama,* 252 F. Supp. 95-104 (1966) wherein the Court said:

> "The term abridged is defined as: 'To make shorter; to shorten in duration; diminish; curtail; as, to abridge a visit—as to abridge one of his rights."

In weighing the justification that a state presents for legislative or judicial abridgement of a citizens rights, the Court must be sure that the States' attempt to achieve a legitimate end does not use means "which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama ex rel. Flowers,* 1964, 84 S.Ct. 1302. "In an area touching our most precious freedoms," precision of regulation must be the touchstone * * *," *N.A.A.C.P. v. Button,* 1963, 83 S.Ct. 328; and, "the breadth of legislative abridgement must be viewed in the light of less drastic means for achieving

the same basic purpose." *Shelton v. Tucker,* 1960, 81 S.Ct. 247, 252.

If a citizen of a state is given the right to vote, a fundamental right, and that right is guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution, then it stands to reason that a state law which permits the state to abridge that right is offensive to due process; put another way, any state law which permits a state to remove an elected official from an office to which he was elected, without cause, prior to the expiration of his term of office, constitutes an *impermissible abridgement of the fundamental right to vote* of those citizen-voters who voted for him or were entitled to vote for him. Otherwise, what good is it to give the right to vote, a most precious right, if it is permitted to be abridged by a state statute, at the whim of a county commissioners court, as was done herein.

A less drastic means is available to Appellants that they could have used herein and have achieved the desired results of redistricting without removing an elected official from office prior to the expiration of his term of office. Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and the provisions of *Ehlinger v. Rankin,* 1895, 29 S.W. 241, Ct. Civ. App. of Tex., which literally establishes the law that justices of the peace and constables are county officers and the only limitation upon them, in reference to residency requirements, during their terms of office is that they must reside within the county in which they were elected. Had the law as established in Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and in *Ehlinger v. Rankin, supra,* been applied as it rightly should have been to the facts that exist herein, no confrontation with the rights as guaranteed

by the Federal Constitution would have been necessary inasmuch as all rights as guaranteed by the Fourteenth Amendment would have been protected; *thereby applying a less drastic means of achieving the same purpose* as decreed in *Shelton v. Tucker, supra.*

III.

THE DISTRICT COURT ACTED CORRECTLY IN REFUSING TO APPLY THE ABSTENTION DOCTRINE BELOW

A. The state statute in question is not fairly subject to an interpretation which will avoid or modify the Federal Constitutional questions involved.

The Appellants in their brief at page 31, would urge the Court to apply the Doctrine of Abstention herein to afford a Texas Court the opportunity to issue a definitive decision on the question whether justices of the peace and constables are county officers. They assure the Court that such a determination would render unnecessary a federal constitutional decision under the Fourteenth Amendment. No such question is now pending before the Courts of Texas.

In this regard, Appellees would respond that such contention as is made by Appellants is designed more to mislead the Court than to urge a serious consideration by the Court of their contention.

The appropriate portion of Article 2351½(c), the State Statute in question, provides as follows:

Article 2351½(c), Vernon's Annotated Texas Civil Statutes.

> Sec. (c). When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Would a definitive decision, by a Texas Court, declaring justices of the peace and constables county officers who could legally reside outside the boundaries of the precincts from which they were elected, alter the effects of the provisions of Article 2351½(c) when applied? No, because if more than one elected justice of the peace or constable resided in a precinct as so changed, their elective offices would still be declared vacant and the same situation as exists herein would still prevail, even though they would have been declared county officers.

The *Abstention Doctrine,* which is judge made, first appeared in 1941 in *Railroad Commission of Texas v. Pullman Company,* 61 S.Ct. 643, and the Court held that:

> "This case sanctions such escape (from hearing and deciding the case when presented, by application of the Abstention Doctrine) only in narrowly limited 'special circumstances'."

In *Zwickler v. Koota*, 88 S.Ct. 391 (1967), the Court said that:

> "The availability of declaratory relief in state courts on federal claims is not reason for abstention."

In the absence of a pending state proceeding, the exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory relief are met. *Younger v. Harris*, 91 S.Ct. 746 (1971). The required conditions called for in *Younger v. Harris* were set forth in *Maryland Casualty Company v. Pacific Coal & Oil Co.*, 61 S.Ct. 510 (1941) and the test established therein is as follows:

> "Whether there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of declaratory relief."

The best test as when to apply and when not to apply the *Abstention Doctrine* was set forth in *N.A.A.C.P. v. Bennett*, 79 S.Ct. 1192, wherein the Court held:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of it bearing fruit."

Applying the law as set forth in *Railroad Commission of Texas v. Pullman, supra; Zwickler v. Koota, supra; Younger v. Harris, supra; Maryland Casualty Company v. Pacific Coal & Oil, supra* and the test for determining

when the Abstention Doctrine should be applied as enumerated in *N.A.A.C.P. v. Bennett, supra,* to the facts of the instant case, it is extremely clear that Article 2351½(c) is not fairly subject to an interpretation which will avoid or modify the federal constitutionl questions involved and the *Abstention Doctrine* is not applicable herein.

B. No compelling state interests shown that would justify the state's acts of offending the due process clause and the equal protection guarantee of the Fourteenth Amendment to the Federal Constitution as was done herein.

If we are to accept Appellants' position on appeal, then we must conclude that a redistricting of justice of the peace and constable precincts, which were extremely disproportionate *prior* to redistricting and which were extremely disproportionate *after* redistricting, is a compelling state interest. (See Exhibit D).

Appellees would stipulate that redistricting was needed prior to June 28, 1973. Likewise, Appellees would stipulate that redistricting was needed after that date. By viewing Exhibit D, it is seen that after redistricting occurred, a variance of 135% existed in population comparison between the largest and the smallest precincts. Why then, would Appellants argue that this redistricting served a compelling state interest? Since this was a voluntary redistricting, why did not Appellants follow the general standards that are fairly applied in mandatory redistricting; that is, why did not Appellants apply the one-man, one-vote principle? Could Appellants' intent have been to serve their personal interest rather than serving some alleged compelling state interest?

While recent decisions of the Supreme Court, from *Baker v. Carr,* 82 S.Ct. 691 (1962), which established the one-man, one-vote principle for establishing legislative bodies to *Avery v. Midland County, Texas,* 88 S.Ct. 1114 (1968), which applied the one-man, one-vote principle to units of local governments with general governmental powers, have mandatorily required redistricting of bodies of government with general governmental powers, no such mandatory requirement has been applied in other units of local government.

But, what about instances, such as the one herein, where a unit of local government with non-general governmental powers is redistricted voluntarily? Does the failure to apply the one-man, one-vote principle offend the equal protection provision of the Fourteenth Amendment? In *Avery v. Midland County, supra,* the Court said that a state's political subdivisions must comply with the requirements of the Fourteenth Amendment.

The real compelling state interest in regard to redistricting is served when the vote of one taxpayer and citizen in a justice of the peace and constable precinct is of substantially equal weight to the vote of another taxpayer and citizen in a different precinct within the same county.

The order of Appellants of June 28, 1973, in creating justice of the peace and constable precincts which are extremely disproportionate in population, *no compelling state interest was served thereby* which would justify offending the *"Due Process Clause"* of the Fourteenth Amendment to the Federal Constitution.

Secondly, Appellants would urge that Texas precinct residency requirements such as is now embodied in Article 1.05, Vernon's Annotated Texas Election Code, is a com-

pelling state interest. The provisions of that Article are as follows:

. Article 1.05, Texas Election Code.

Art. 1.05. Ineligibility

No person shall be eligible to be a candidate for, or to be elected or appointed to, any public office in this state unless he is a citizen of the United States eligible to hold such office under the Constitution and laws of this state and is under none of the disabilities for voting which are stated in Article VI, Section 1 of the Constitution of Texas on the date of his appointment or of the election at which he is elected, and unless he will have resided in this state for a period of twelve months next preceding the applicable date specified below, and for any public office which is less than statewide, shall have resided for six months next preceding such date in the district, county, precinct, municipality or other political subdivision for which the office is to be filled:

(1) For a candidate whose name is printed on the ballot for a general (first) primary election, the applicable date is the last day on which any candidate for the office involved could file his application to have his name printed on the ballot for that primary election.

(2) For an independent or nonpartisan candidate in a general or special election, the applicable date is the last day on which the candidate's application for a place on the ballot could be delivered to the appropriate officer for receiving the application.

(3) For a write-in candidate, the applicable date is the day of the election at which the candidate's name is written in.

(4) For a party nominee who is nominated by any method other than by primary election, the ap-

plicable date is the day on which the nomination is made.

(5) For an appointee to an office, the applicable date is the day on which the appointment is made.

The foreging requirements shall not apply to any office for which the Constitution or statutes of the United States or of this state prescribe qualifications in conflict herewith, and in case of conflict the provisions of such other laws shall control.

Except as provided in Section 104 of this code,[1] no eligible candidate shall ever have his name placed upon the ballot at any primary, general or special election. No ineligible candidate shall ever be voted upon nor have votes counted for him at any such primary, general or special election for the purpose of nominating or electing him, but votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election. No person who advocates the overthrow by force or violence or change by unconstitutional means of the present constitutional form of government of the United States or of this state, shall be eligible to have his name printed on any official ballot in any general, special or primary election in this state.

Amended by Acts 1967, 60th Leg., p. 1861, ch. 723 § 4, eff. Aug. 23, 1967.

Appellants urge the Court that Article 1.05, *supra* acting in conjunction with Article 2351½(c), establishes a residency requirement within a justice of the peace or constable precinct which is of such a compelling state interest to justify the effects of Article 2351½(c).

---

1. Article 8.22.

Article 16, Section 14 of the Texas Constitution, (see Exhibit E), establishes the residency requirements of county officers in Texas. And justices of the peace and constables having been classified as county officers in Article 5, Section 24, Texas Constitution, (see Exhibit G), and the decision of the Court in *Ehlinger v. Rankin,* 29 S.W. 241, Ct. Civ. App. of Tex. (1895) which interpreted Article 16, Section 14, Texas Constitution, governs the residency requirement of the offices in question and it provides as follows:

> " . . . that this provision is self-enacting and needed no legislation to be put into effect. The residency requirement of this constitutional provision requires that a county officer live in the county. The county referred to is the county in which he was elected."

Yet, in spite of *Article 16, Section 14,* of the *Texas Constitution,* and the decision in *Ehlinger v. Rankin, supra,* Appellants contend that a justice of the peace and constable must reside in the precinct in which they are serving during their term of office. Further, they contend that *Article 1.05* of the *Texas Election Code,* is the compelling state interest justifying the effects of the state statute in question herein.

The Three Judge District Court, which heard all the evidence of all parties, heard the arguments of all Counsel therefor, was in the best position to judge whether Appellants' actions justified the denial of the rights as guaranteed by the Fourteenth Amendment of the Federal Constitution.

The Court concluded, after all parties had been heard, as follows:

> " . . . insofar as Article 2351½(c) operated to end the term of a duly elected official upon the circumstance of a mere convenience redistricting, it invidiously and irrationally discriminates against the official and the electorate who voted for him or were entitled to vote for him and voters whose franchise was not so bobbed."

The Court further held:

> "The new precincts were clearly not drawn with equality in mind; nor would population equalization, if seen as a compelling reason for redistricting, bear any necessary relation to vacating these offices, a different consideration entirely."

While Appellants argue the great need for redistricting and the great need for compliance with *Article 1.05* as being compelling state interests, justifying the effects of Article 2351½(c) (see Exhibit F), they fail to note the compelling interests of the Fourteenth Amendment to the Federal Constitution which protects the citizen from a state that promotes laws which are invidious and discriminatory. Appellants' strong defense of these provisions and their strong urging to the Court that they justify the effects of Article 2351½(c), *Id.*, as a compelling state interest, is reminiscent of the story of the dead mackerel that lay upon the ocean shore, it silver coat glistening in the light of the moon; it shines and stinks at the same time.

IV.

NO ADEQUATE REMEDY EXISTS FOR APPELLEES UNDER TEXAS LAW

In *State ex rel. Dowlen v. Rigsby*, 43 S.W. 1101, (Tex. S.Ct. 1897) and the reiteration of the holding of the

Rigsby case, *supra,* in *Williams v. Castleman,* 247 S.W. 263 (Tex. S.Ct. 1922), which holds:

> " . . . that upon the effective date of a redistricting order, redistricting the precincts of a justice of the peace or constable, the old precincts and precinct offices cease to exist, and as of that date, new precincts came into existence with the precinct offices vacant,"

the rule was established by the highest Court of the State of Texas and was the law until Article 2351½(c) came into existence in 1965.

When Article 2351½(c), came into effect, the holdings in the *Rigsby* case, supra, and the *Castleman* case, supra, no longer applied.

If Appellees were required to resort to the Texas Courts for relief in this instance, they would be compelled to attack the provisions of Article 2351½(c), because this was the instrument used by Appellants in removing them from office.

But, even if successful in challenging Article 2351½(c), and it is declared unconstitutional, the Doctrine of Stare Decisis, which Texas follows, would reimplement the holdings of the *Rigsby* case, *supra,* and the *Castleman* case, *supra,* which is even more harsh in its application than Article 2351½(c). Thus, as is permitted under the provisions of Article 2351½(c), the Appellees would automatically be removed from office, without cause, prior to the expiration of their terms of office.

Because of the foregoing, the federal constitutional questions would still exist in either situation. It is, there-

fore, inevitable that the federal constitutional questions raised must be resolved by a Federal Court.

To require Appellees to return to the State Court, in light of the decisions of the *Rigsby* case, *supra,* and the *Castleman* case, *supra,* and the explicit provisions of Article 2351½(c), neither of which gives consideration to the federal constitutional rights of Appellees, would impose unnecessary expense and long delay upon litigants without hope of bearing fruit.

CONCLUSION

It is submitted that the ruling of the District Court below was in all things proper and for the reasons set out in this Brief of Appellees, the lower Court should in all things be affirmed.

Respectfully submitted,

JOHN G. GILLELAND

VIRGIL H. BARFIELD

Attorneys for Appellees,
Richard E. Moore, J. C. Bolton,
Vernon Doering, J. W. Mahan,
and John Boynton
500 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
Phone 1-713-222-6127

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellees do hereby certify that on August 12, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' and Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled "Brief for the Appellees".

Joe Resweber
County Attorney
Harris County, Texas
For Appellants, Harris County
Commissioners Court
Houston, Texas 77002

Edward J. Landry
Senior Assistant County
Attorney
For Appellants, Harris County
Commissioners Court
202 Harris County Courthouse
Houston, Texas 77002

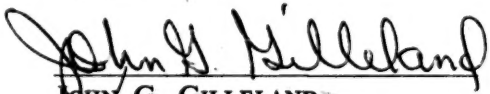
Michael R. Davis
Assistant County Attorney
For Appellants, Harris County
Commissioners Court
202 Harris County Courthouse
Houston, Texas 77002

C. Anthony Friloux, Jr.
Attorney in Charge
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

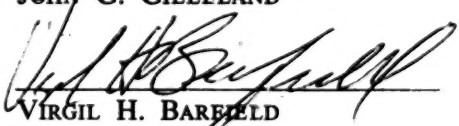
Gerald A. Woolf
Of Counsel
For Plaintiff Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

All parties required to be served have been served.

Signed:



JOHN G. GILLELAND



VIRGIL H. BARFIELD
Attorneys for Appellees

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A — Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit D — POPULATION EXHIBIT OF PRECINCT

Exhibit E — ARTICLE 16, SECTION 14, VERNON'S ANNOTATED TEXAS CONSTITUTION

Exhibit F — Article 2351½, Vernon's Annotated Texas Civil Statutes

Exhibit G — ARTICLE 5, SECTION 24, VERNON'S ANNOTATED TEXAS CONSTITUTION

Exhibit H — ARTICLE 5, SECTION 28, VERNON'S ANNOTATED TEXAS CONSTITUTION

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos. 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S.C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

1. Tex. Const. Art. 5, §18.

> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices.

These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statewide effect, and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities"

---

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

clause of the Fourteenth Amendment has become irrelevant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ___ U.S.___, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

EXHIBIT D

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are as follows:

Pct. No.	Population Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.

EXHIBIT E

Article 16, Section 14, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 14. Civil officers; residence; location of offices

> Sec. 16. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

EXHIBIT F

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commissioners precincts are changed, the terms of office of the commissioners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable

resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

EXHIBIT G

Article 5, Section 24, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 24. Removal of County Officers

> Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

EXHIBIT H

Article 5, Section 28, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 28. Vacancies in judicial offices

Sec. 28. Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts shall be filled by the Governor until the next succeeding general election; and vacancies in the office of County Judge and justices of the peace shall be filled by the Commissioners Court until the next general election for such offices. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

AUG 21 1974

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

BRIEF FOR APPELLEE GENE ZABOROSKI

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
1215 First National Life Bldg.
Houston, Texas 77002
(713) 227-4141

Attorneys for Appellee,
Gene Zaboroski

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	4
STATEMENT	4
ARGUMENT:	
I. INTRODUCTION	7
II. REDISTRICTING IN MID-TERM NOT A NECESSITY	8
III. NO COMPELLING STATE INTEREST EXISTS TO JUSTIFY THE DENIAL OF CONSTITUTIONAL RIGHTS TO APPELLEES	13
IV. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY UNEQUAL PROTECTION BETWEEN MEMBERS OF THE SAME CLASS	16
V. THE QUESTION OF THE PRECINCT RESIDENCY OF JUSTICES OF THE PEACE AND CONSTABLES WOULD HAVE BEEN AVOIDED IF APPELLANTS HAD PRESERVED THE CONSTITUTIONAL RIGHTS OF APPELLEE	20
VI. THERE IS NO BASIS FOR APPLICATION OF ABSTENTION DOCTRINE	21
CONCLUSION	23
CERTIFICATE OF SERVICE	24
APPENDIX INDEX	25

LIST OF AUTHORITIES

CASES

	Page
Andersen v. Martin, 375 U.S. 399 (1964)	17
Arla Inc. v. Giarusso, No. 71-1364 (E.D. La. 1971)	22
Avery v. Midland County, Texas, 390 U.S. 474 (1968)	12, 13, 14, 15
Cooper v. Arron, 358 U.S. 1 (1958)	17
Dubois v. State of Louisiana, 339 F.Supp. 685 (E.D. La. 1972)	21
Doud v. Hodge, 350 U.S. 485 (1956)	22

CASES

	Page
Ellis v. Mayor of Baltimore, 234 F.Supp. 945 (D. Md. 1964) aff'd. and remanded 352 F.2d 123 (4th Cir., 1965)	14
Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972)	21
Gary v. Sanders, 372 U.S. 368 (1963)	13, 14
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	16, 17, 18
Hunter v. Erickson, 393 U.S. 385 (1969)	19
Hyden v. Baker, 286 F.Supp. 475 (M.D. Tenn. 1968)	14
Kaelin v. Borden, 344 F.Supp. 598 (E.D. Pa. 1971)	14
Louisiana v. United States, 380 U.S. 145 (1965)	17
Loving v. Virginia, 388 U.S. 1 (1967)	19
Martinoich v. Dean, 256 F.Supp. 612 (S.D. Miss. 1966)	14
Native American Church of Navajoland v. Arizona Corp. Commission, 329 F.Supp. 907 (D. Ariz. 1971) aff'd. 405 U.S. 901 (1972)	22
Reynolds v. Sims, 377 U.S. 533 (1964)	13, 14, 15, 17
Roman v. Sincock, 377 U.S. 695 (1964)	15
Sailors v. Ken Board of Education, 387 U.S. 105 (1967)	13, 16
Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965)	17, 18
Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919)	17
Strickland v. Burns, 256 F.Supp. 824 (M.D. Tenn. 1966)	14
United States v. Mississippi, 380 U.S. 128 (1965)	17
Whitcomb v. Chavis, 403 U.S. 124 (1971)	17, 18
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	22
Zwiekler v. Koota, 389 U.S. 241 (1969)	21

UNITED STATES CONSTITUTION

Fifth Amendment	5
Ninth Amendment	5
Fourteenth Amendment	5, 18, 19
Fifteenth Amendment	5, 17

UNITED STATES STATUTES

28 U.S.C.A. Sections 1343, 2201 and 2281	5
28 U.S.C.A. Section 2281	6
42 U.S.C.A. Sections 1983 and 1985(3)	5

TEXAS CONSTITUTION

Article V, Section 18	5, 16, 23

TEXAS CIVIL STATUTES

Article 2351½ Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, Sec. 1 effected Aug. 10, 1965)	cited throughout brief

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

---

BRIEF FOR APPELLEE GENE ZABOROSKI

Appellee Gene Zaboroski prays that the ruling of the United States District Court for the Southern District of Texas declaring Texas statute, Article 2351½ Vernon's Annotated Texas Civil Statute facially unconstitutional should in all things be affirmed.

OPINIONS BELOW

On January 30, 1974, the same day on which the Three-Judge United States District Court for the Southern District of Texas, Houston Division, heard oral argument, they issued the order appealed herein. A written opinion was filed by the three-judge District Court on February 8, 1974. Both the judgment order and opinion of the three-judge District Court are as yet unreported and a copy of the judgment order and of the opinion are appended hereto as Exhibits "A" and "B", respectively.

JURISDICTION

The judgment of the three-judge District Court was filed January 30, 1974. On February 4, 1974, Mr. Justice Powell stayed the execution and enforcement of the District Court judgment pending further order of the Supreme Court. On February 8, 1974, the three-judge District Court filed its written opinion. On February 19, 1974, the Supreme Court denied Appellee's Motion to vacate the Stay Order.

Appellants' jurisdictional statement was filed April 3, 1974 and thereafter on May 3, 1974, Appellee filed his Motion to Dismiss. Probable jurisdiction was noted by the Supreme Court on June 3, 1974.

This appeal is one from the judgment of a three-judge United States District Court for the Southern District of Texas, Houston Division, entering a declaratory judgment and granting a permanent injunction restraining the enforcement, operation and execution of a state statute.

STATUTE INVOLVED

Article 2351½, Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, sec. 1, eff. August 30, 1965), provided as of the dates involved in this case, and presently so provides:

> "Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts
>
> (a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.
>
> (b) When boundaries of commissioners precincts are changed, the terms of office of the commissioner then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.
>
> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable re-

sides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant."

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, Sec. 1, eff. Aug. 30, 1965.

QUESTION PRESENTED

Whether Article 2351½ (c), Vernon's Annotated Texas Civil Statute, is facially unconstitutional?

STATEMENT

Appellee Gene Zaboroski, a white Republican candidate for the office of Justice of Peace of Precinct No. 6 of Harris County, Texas, was chosen by the voters of that precinct in the general elections of November, 1970. As provided for by statute, his term of office commenced on January 1, 1971 and his term of office was to expire at midnight on the 31st day of December, 1974.

However, on June 30, 1973, the Harris County Commissioners Court, a constitutionally created body responsible for, among other duties, the supervision, control and administration of certain voting laws enacted by the Texas Legislature, passed a redistricting order reconstituting certain Justices of the Peace and Constable Precincts, including Precinct No. 6. The redistricting order was ef-

fected through the power granted to the Commissioners Court pursuant to the mandates of Article 5, Section 18, Texas Constitution and Article 2351½, Texas Revised Civil Statutes Annotated (1971). As intended and effected, the ordered redistricting created new precincts primarily on the basis of racial, ethnic and political lines, without regard to the mandates of the one-man, one-vote rule. The publicly stated purposes for the redistricting of the Justice of the Peace and Constable precincts were to eliminate the gross population disparity existing in such precincts; to make the offices more convenient to all the people of the county; and to draw new precinct boundaries along ethnic or racial lines so as to assure the election of minorities to the offices of Justices of the Peace and Constables in the future. The main consideration, as contended by Appellants, for redistricting was that the gross population disparity of the various precincts created a compelling state interest to bring about redistricting of the said Justices of the Peace and Constable precincts.

As a direct result of the actions of Appellants, in passing a redistricting bill by a vote of 3 to 2, they effected the removal of Republican Appellee Zaboroski from his publicly elected office, Justice of the Peace of Precinct No. 6, Harris County, Texas.

This suit was brought by Appellee Gene Zaboroski, on his own behalf, and on behalf of all white voters in Harris County, Texas similarly situated, to vindicate the rights guaranteed to them by the United States Constitution, Amendments Five, Nine, Fourteen and Fifteen, and through certain Federal Civil Rights statutes, 42 U.S.C. Sections 1983 and 1985(3) and under 28 U.S.C. Sections 1343, 2201 and 2281.

All the parties to the cause of action filed agreed to stipulations of evidence concerning said suit and the matter was heard on oral arguments only by a three-judge District Court on January 30, 1974. On that date the Three-Judge District Court for the Southern District of Texas, Houston Division, issued its judgment order declaring as follows: (1) This Court has jurisdiction under Title 28, U.S.C.A., §2281. (2) The Texas statute Article 2351½, Vernon's Annotated Civil Statute is facially unconstitutional. (3) The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined. (See Exhibit A attached hereto.)

Approximately one month later on February 8, 1974, the District Court filed its written opinion stating:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so effected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination. Certainly it was not necessary to effect redistricting in midterm or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analagous section pertaining to county commissioners, Article 2352½(c), expressly provides that the term of office of a county commissioner is not to be effected by redistricting, even though its effect may be to place his residence outside the precinct to which he was elected."
>
> "The duly elected justice of the peace and constables, Plaintiffs herein, are entitled to serve the terms to which they were elected." (See Exhibit B.)

Additionally, the Court after hearing all of the evidence, stipulations and arguments of counsel, found that no compelling state interest is served to justify such effects of the statute.

ARGUMENT

I. INTRODUCTION.

The question raised by the findings and order of the three-judge District Court is a relatively simple one and is confined to the single question, "Is Article 2351½(c) facially unconstitutional?"

The opinion of the three-judge District Court held that there was no compelling state interest served by the acts of the County Commissioners which "operates to truncate the term of a duly elected official upon the circumstances that mere convenience redistricting places him in a district with others," and that "it invidiously and irrationally discriminates between him [Justice of the Peace] and others not so affected and between the effect of the votes of those who voted or those who were entitled to vote in this election and voters whose franchise were not so bobbed". (Exhibit B at 34). Appellants in their brief cite several state interests which allegedly were served by the redistricting of the Justice of the Peace and Constible precincts and attempt to argue that such interests were compelling state interests and thereby legitimize Appellants' actions if Appellee or the Court cannot show an element of intentional or purposeful discrimination against those Justices of the Peace and Constables removed from office.

II. REDISTRICTING IN MID-TERM WAS NOT A NECESSITY.

Before Appellee would show this Honorable Court how shallow and meaningless are the compelling state interests offered by Appellants as justification for their unconstitutional acts, Appellee would like to put to rest, once and for all, Appellants' claim that, "no redistricting could ever be effected which would not cut short the term of office of at least some of the offices in question." (App. Brief at 27).[1]

Obviously this statement is not true. The fact is that there are several ways in which the redistricting complained of herein could have been accomplished without offending the constitutional rights of any of the Appellees. However, in light of their actions, it is not surprising that Appellants argue the necessity of effecting redistricting in mid-term,[2] because they never made a good-faith effort to protect the constitutional rights of those office holders and voters who were disenfranchised by this redistricting. This lack of good-faith on behalf of the Harris County Commissioners Court evidenced by not effecting a redistricting plan for Justices of the Peace and Constables which would not have bobbed the rights of office holders or voters was so glaring that it prompted the Honorable Judge John V. Singleton[3] to question Appellants' motives in ordering the redistricting:

---

1. App. Brief references are to Appellants' Brief on the Merits filed July 18, 1974.

2. App. Brief at 19.

3. The three-judge District Court was composed of the Honorable Thomas Gibbs Gee, Fifth Circuit Judge, the Honorable John V. Singleton, Jr. and the Honorable Carl O. Bue, District Judges from the Southern District of Texas.

> "Can you think of any other incident in the entire spectrum of our government where any elected post is given that type of unlimited discretion over another elected official?"
>
> "Can you think of any area in our entire system of government where one body is given the unlimited discretionary power to remove from office another elected official?"[4]

This lack of good-faith and insensitiveness to the needs of the voters of Harris County was displayed by the clandestine method in which the redistricting plan was presented to the Commissioners Court for approval. Commissioner Robert Y. Eckels testified that he was not aware of the "Bass plan" until the morning it was presented for a vote. (Deposition of Robert Y. Eckels at 30, 31). When questioned as to the reason behind an immediate implementation of the redistricting plan, the only justification was, "that it needed to be done now, as far away from the county elections as possible, so the dust could settle and not have controversy. . . ." (Deposition of Robert Y. Eckels at 18). The reason Appellants wanted the "dust to settle" and implemented the redistricting in mid-term was to gain the opportunity to fill those vacancies created by the redistricting with political favorites. Albeit those appointees were to include several members of minorities whose participation in County government was desperately wanting, it is the manner and method in which these admirable goals were thrust upon the unsuspecting elected office holders and their constituents that offends Appellees' constitutional rights.

Nevertheless, assume arguendo that there were no "bad motives" on behalf of the Harris County Commissioners

4. Transcript of proceedings January 30, 1974 at 71-72; see also, comments of the Honorable Judge Thomas Gibbs Gee at 60.

Court in ordering the redistricting to be effective in mid-term, there still was a deprivation of Appellee's constitutional rights. First of all, if the Justices of the Peace and Constable precincts had existed as they were for over 100 years, a few more months would not have caused any irreparable harm to the residents of Harris County. With this in mind, Appellants could have made the redistricting effective at the end of the term of the present encumbants. In this manner the elected Justices of the Peace and Constables would have remained in their elected offices until their respective constitutionally created terms had expired. Then when the new Justices of the Peace and Constables were elected they would have been elected by the voters of the new Justices of the Peace and Constable precincts.

There is really nothing novel about this idea in that it was immediately brought to the attention of Appellants during oral argument before the three-judge District Court by the Honorable Judge Thomas Gibbs Gee.

> "Counsel, you are not seriously arguing that this had to be done, that the post had to be eliminated in order to get more equal precincts, are you, because that could have been avoided in many ways."
>
> "In the first place, the order might have been made effective only at the end of the term of the then present encumbant. . . ."[5]

And when one examines Sections (a) and (b) of Article 2351½ it is apparent that this course of action was actually what the legislature intended when they adopted language reading:

---

5. Transcript of proceedings January 30, 1974 at 54, 62.

> "Whenever the Commissioners Court changes the boundaries of commissioners precincts *or of Justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective.*"
>
> . . . . A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precincts not having been in existence for that length of time."[6]

In fact, it is hard to imagine for what other purpose this language could have been intended, especially when viewed in light of the particular mention paid to County Commissioners remaining in office for the remainder of their term even though the change in boundaries may have placed their residence outside the precinct for which they were elected.[7]

A second procedure for redistricting by which Appellants could have preserved and protected the constitutional rights of all Appellees, would have been for the Harris County Commissioners Court to have drawn the new Justice of the Peace and Constable precinct boundary lines in such a manner that all of the Justices of the Peace and Constables in office at the time of the redistricting would have remained in office after the redistricting; *i.e.*, insure that not more than one Justice of the Peace or Constable resides within a precinct so changed.

This solution was also offered by Honorable Judge Thomas Gibbs Gee during oral argument before the three-judge District Court as an alternative to the plan

6. Article 2351½(a).

7. Article 2351½(b).

adopted by the Harris County Commissioners Court and now under scrutiny and Appellants evidently from the tone of their brief[8] agree, at least in principle, that this solution was theoretically possible. It does not seem that it would have been unreasonable or even a difficult task for Appellants to have added to their alleged states purposes the additional requirement that no duly elected official was to be removed from his office by the redistricting. It is also striking that the only Republican Justice of the Peace was arbitrarily removed and a Democrat crony of the three-man majority of the Commissioners Court appointed in his place; couple this with the careful carving of Appellee Zaboroski's voting precinct which assures election of future Democratic candidates to the new voting precinct, and the political motives become blatantly apparent. It would also seem that any committee with as diversed interest as the nine persons appointed to formulate an acceptable redistricting plan would not have been hampered in the slightest by such an additional burden as protecting the constitutional rights of the voters and elected officials. In this regard, it should be noted that when this same committee was faced with the strict requirements of the one-man, one-vote rule of *Avery v. Midland County, Texas,* 390 U.S. 474, in redistricting the four precincts of the County Commissioners, they did so within the constitutional limitations required by this Court. However, when operating without constitutional guidelines and only in response to political patronage and special interest groups to insure "minority participation" this committee, dominated by County Commissioner Tom Bass, designed and promoted a redistricting plan lacking in equal protection, devoid of due process and reaking of political opprobium.

8. App. Brief at 19.

Without belaboring the point, it would appear that the contention of Appellant that "no redistricting could ever be effected which would not cut short the term of office of at least some of the offices in question" is totally without merit, and therefore cannot justify or even support a good-faith reliance upon effecting redistricting in mid-term.

III. NO COMPELLING STATE INTEREST EXISTS TO JUSTIFY THE DENIAL OF CONSTITUTIONAL RIGHTS TO APPELLEES.

In *Reynolds v. Sims,* 377 U.S. 533 (1964), the equal protection clause was applied to the apportionment of state legislatures. The Supreme Court held that every qualified resident had the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that such right was infringed when legislators were elected from districts of substantially unequal population.

The Supreme Court sought to clarify *Reynolds,* supra. in *Sailors v. Kent Board of Education,* 387 U.S. 105 (1967) and to identify the circumstances in which application of the one-man one-vote rule was required. This Court noted that there was no constitutional requirement that state and local officers of non-legislative character be chosen by election rather than appointment. However, the question of the applicability of the rule where elections was required was left open and the Court held, assuming arguendo "where a state provides for an election of a local officer or agency—whether administrative, legislative or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met," 387 U.S. at 111.

This open question was substantially resolved by *Avery v. Midland County*, supra, decided shortly thereafter:

> "The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparat population. As also every court which addressed itself to this question, we hold it does."[9]

The one-man one-vote rule has been applied with great breadth: It has been held to govern the election of County Commissioners, *Avery v. Midland County*, supra; *Kaelin v. Borden*, 344 F.Supp. 598 (E.D. Pa. 1971); and Justices of the State Supreme Court and Courts of Appeal, *Gray v. Sanders*, supra.

In *Gray* the Court held that the rule must be applied to elected state executive and judicial officers as well as to their legislative breathern.

> "[O]nce the class of voters is chosen and their qualifications specified we see no constitutional way by which equality of voting power may be abated."

372 U.S. 381. *Accord, Ellis v. Mayor of Baltimore*, 234 F.Supp. 945 (D. Md. 1964), aff'd. and remanded, 352 F.2d 123 (4th Cir. 1965); *Hyden v. Baker*, 286 F.Supp. 475 (M.D. Tenn. 1968); *Martinoich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966); *Strickland v. Burns*, 256 F.Supp. 824 (M.D. Tenn. 1966); all cases applying *Reynolds* to local government.

While population is the starting point and the con-

---

9. *Id.* at 478-479; see also the cases in which the highest State Court applied the principles of *Reynolds* to units of local government collected at 390 U.S. 479 n. 3.

trolling criteria for decision in apportionment controversies, *Reynolds,* supra, mathematical exactness in districting is neither possible nor required. For instance, in *Roman v. Sincock,* 377 U.S. 695 (1964) the Supreme Court stated that the proper judicial approach in apportionment cases was to determine whether under the particular circumstances existing, there had been faithful adherence to a plan of population-based representation, with only such minor deviations as might occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

What must be pointed out at this time is the fact that the redistricting of June 28, 1973 was a voluntary, rather than mandatory, court ordered plan. With one hand the Harris County Commissioners Court voluntarily undertook to redistrict Justice of the Peace and Constable precincts, "for the convenience of the people," with the stated purpose of conforming to the one-man one-vote rule. And then with the other hand, Appellants proceeded to adopt a plan not even remotely approaching *Avery* requirements.

Even a cursory view of Exhibit C reveals that the requirements of *Avery* have been completely ignored. The redistricting order of June 28, 1973 established new precincts having substantial and significant population variances, with one precinct having as much as 2½ times the population of another. A population percentage of over 135%. See Exhibit C. Such a scheme is patently invalid, and cannot be presumed even to be a good-faith attempt to follow the mandate of *Reynolds.* How then, can Appellants claim as a compelling state interest their intention to redistrict to effect the one-man one-vote rule?

IV. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY UNEQUAL PROTECTION BETWEEN MEMBERS OF THE SAME CLASS.

The United States Supreme Court has repeatedly held that a state cannot manipulate its political subdivisions so as to defeat a federally protected right as for example, by realigning political subdivisions so as to deny a person his vote because of race, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Sailors v. Kent Board of Education,* supra.

The Texas Constitution, Article V, Section 18, and Article V, Section 24, establishes County Commissioners, Justices of the Peace and Constables as county officers. As county officers, they are members of the same class and Article 2351½ is facially unconstitutional in that it discriminates against members of the same class by treating them differently with no compelling reason or justification.

Paragraph (a) of Article 2351½ involves Commissioners Court changing a Commissioners' precinct boundaries during the term of their office and provides the following:

> "It may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective."

However, Paragraph (c) of Article 2351½ does not require the Commissioners Court to delay the effective date of a change in precinct boundaries or redistricting of a Justice of the Peace or Constable precinct until, "the first day of January following the next general

election." This obvious legislative negative delegation of different standards or treatment between commissioners of a Commissioners Court in Paragraph (a), and of Justices of the Peace and Constables in Paragraph (c) of Article 2351½ is an uncontrovertable example of "unequal treatment of persons within the same class."

Local bodies to whom the state delegates authority cannot circumvent this restraint imposed by the Constitution. *Standard Computing Scale Co. v. Farrell,* 249 U.S. 571, 577 (1919); *Cooper v. Arron,* 358 U.S. 1, 17 (1958).

In *Gomillion* this Court held that a statute passed by the Alabama legislature gerrymandering the boundaries of the City of Tuskegee "from a square to an uncouth 28 sided figure" in order to disenfranchise a majority of negro voters was unconstitutional as violative of the Fifteenth Amendment.

Denial or delution of the right to vote on the basis of race has been struck down consistently by the Courts, irrespective of the method utilized to bring about such denial of the franchise. See *e.g., United States v. Mississippi,* 380 U.S. 128 (1965); *Louisiana v. United States,* 380 U.S. 145 (1965) (voter interpretation test invalid); *Andersen v. Martin,* 375 U.S. 399 (1964) (printing of candidates race on the ballot held invalid).

Gerrymandering on the basis of race is by itself a violation of the Fourteenth and Fifteenth Amendments to the Constitution, *Sims v. Baggett,* 247 F. Supp. 96, 104 (M.D. Ala. 1965), aff'd. sub. nom.; *Reynolds v. Sims,* supra. There has been and should be no hesitation in striking down such contrivances when they infringe on protective rights, *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971).

In *Whitcomb* a challenge was made to state statutes establishing Marion County, Indiana, as a multi-member district for the election of state representatives on the basis that the law diluted the votes of negroes and poor persons living in the ghetto area of Marion County. This Court distinguished cases such as *Sims* and *Gomillion* and reversed the three-judge District Court finding that the statutes were unconstitutional only because:

> "[T]here is no suggestion here that Marion County's multi-member district or similar districts throughout the state were conceived or operated as purposeful devices to further racial or economic discrimination."

However, at bar, Appellants have never challenged the allegation that one of the primary purposes of redistricting was to draw the Justice of the Peace and Constable precinct lines in such a manner that minority enclaves were created within the county.[10] Appellant compounds this illconceived derogation of their fiduciary duty to the residents of Harris County by appointing political favorites to fill the vacancies created by the redistricting with their eyes not on "the convenience of the people" but rather to broadening their own political power base and insuring their continued existence and election to office. If one accepts this as the true reason for redistricting, the real motive behind the necessity of a mid-term implementation of the redistricting surfaces in the form of time to allow their appointees an opportunity to ingratiate themselves in office and help insure their own re-election.

The clear and essential purpose of the Fourteenth Amendment was to eliminate all official state sources

---

10. App. Brief at 5.

of invidious racial discrimination, *Loving v. Virginia,* 388 U.S. 1 (1967), and for that reason racial classifications are always constitutionally suspect, subject to the most rigid scrutiny, and bear a far heavier burden of justification than other classifications. *Hunter v. Erickson,* 393 U.S. 385 (1969).

Similarly, gerrymandering and other schemes when effected for the purpose of discrimination on the basis of ethnic origin, religion, wealth, or political affiliation must be held to violate the equal protection clause of the Fourteenth Amendment.

The sworn testimony presented by depositions to this Court clearly reflects that a primary and avowed purpose of the Commissioners Court in redistricting was to realign voting districts on the basis of race, ethnic origin and political affiliation and that said redistricting was enacted for the additional purpose of creating "safe" Democratic districts composed of minorities and for the purpose of removing from office the sole elected Republican Justice of the Peace, Appellee Gene Zaboroski.

It is quite obvious that the equal protection clause, which prohibits arbitrary and invidious discrimination between citizens of the same class has been contravened by the legislative attempt to circumvent both the express mandate of ArticleV, Section 18 and Section 24 and the prohibitions embodied in the equal protection clause itself by the arbitrary treatment of Justices of the Peace and Constables and County Commissioners within their same county.

V. THE QUESTION OF THE PRECINCT RESIDENCY OF JUSTICES OF THE PEACE AND CONSTABLES WOULD HAVE BEEN AVOIDED IF APPELLANTS HAD PRESERVED THE CONSTITUTIONAL RIGHTS OF APPELLEE.

Appellants argue at some length in points B(a) and (4) of their brief that the Texas residence requirement that Justices of the Peace and Constables must reside in precincts which they serve, is a compelling state interest justifying the removal of such non-resident Justices of the Peace and Constables from office after a mid-term redistricting. This is, of course, the ultimate case of the tail wagging the dog. Note how quickly these two "compelling state interests" would be rendered moot if Appellants had simply seen fit to use either of the two plans for implementing redistricting set out by Appellee, supra.

If Appellant, had either implemented the redistricting at the end of the elected term of each respective Justice of the Peace or Constable or had altered the precinct lines of the Justice of the Peace or Constable precincts so as to include only one Justice of the Peace and Constable in each precinct, they would have avoided the fiction of having to create a compelling state interest to justify the removal from office of those Justices of the Peace and Constables who did not comply with their intended results.

Hindsight reveals that it was not until some time after the Justice of the Peace and Constable precincts had been redistricted and a lawsuit filed in the Federal Court on behalf of the ousted Justices of the Peace and Constables that Appellants began to concern themselves with "compelling state interests." Appellees now find themselves in the

ludicrous position of giving credence to Appellants' dog wagging position when the entire incident was caused by Appellants' lawless acts and could have been avoided with no harm to either side.

VI. THERE IS NO BASIS FOR APPLICATION OF THE ABSTENTION DOCTRINE.

The Federal Courts have repeatedly emphasized that abstention is appropriate only in narrowly limited special circumstances, *Zwickler v. Koota,* 389 U.S. 241, 248 (1967). The governing rule was succinctly stated in *Garvin v. Rosenau,* 455 F.2d 233 (6th Cir. 1972):

> "The mere fact that a constitutional decision conceivably could be avoided or that federal-state friction might arise does not automatically justify resort to the doctrine. The facts and circumstances of each case must be carefully examined in order to evaluate the policies to be served by abstention. *Thus, resort to abstention is appropriate only if the narrowly limited countervailing interests are, on balance, more important to the federal constitutional system than a litigants right to a federal forum.*" (Emphasis added).

Id. at 238. Judge Wisdom, specially conferring in *Dubois v. State of Louisiana,* 339 F. Supp. 685, 690-61 (E.D. La. 1972, noted the extremely limited scope permissible in applying the abstention doctrine, and cautioned against reading the Court's decision of that day as adding breadth to the doctrine. Judge Wisdom stated that, where a state statute had been recently amended and there had been no opportunity for authoritative state court interpretation of the new provisions, and where a state civil action involving identical questions was pending, the

pending lawsuit provided "a reasonable hope of a prompt state court construction question," thereby making application of the abstention doctrine appropriate. *Id* at 690; *Arla Inc. v. Giarusso,* No. 71-1364 (E.D. La., Nov. 1971). He went on to caution that:

> "[O]ur decision [in *Dubois*] should not be read to require or even authorize the postponement of federal jurisdiction in constitution litigation when no state court construction of the state law under attack is clearly shown to be forthcoming."

Id. accord, *Wisconsin v. Constantineau,* 400 U.S. 433, 438, 438-39 (1971) (abstention proper only where there are presented "unresolved questions of state law which only a state tribunal could authoritatively construe," which are dispositive of the constitional question).

In *Constantineau,* the Supreme Court affirmed the taking of jurisdiction by a three-judge federal court even though the statute which had been struck down had never been challenged or tested in the Wisconsin state courts.

Thus, even where state courts have not yet rendered a clear or definite decision as to the applicability or constitutionality of the statutes in question, the federal courts are not deprived of jurisdiction to consider claimed relief under Section 1983, *Doud v. Hodge,* 350 U.S. 485 (1956); *Native American Church of Navajoland v. Arizona Corp. Commission,* 329 F. Supp. 907, 909 (D. Ariz. 1971), aff'd 405 U.S. 901 (1972).

In the instant case there is neither a civil nor a criminal action pending in the state courts wherein the significant constitutional questions here raised could be decided. The provisions under attack are not newly enacted or amended;

in fact, Article V, Section 18 of the Texas Constitution has remained substantially in its present form since 1875, with slight amendment in 1954. Similarly, Article 2351½ was enacted in 1965.

There is no basis for abstention on questions of such import and weight as are here presented, particularly the issue as to denial of equal protection on the basis of race—a guarantee which has been jealously guarded in federal courts since the enactment of the Civil War amendments.

CONCLUSION

Based upon the ruling and opinion of the Three-Judge United States District Court for the Southern District of Texas holding that there was no compelling state interest to justify the actions of the Commissioners Court and the feeble compelling state interests set out in Appellants' brief, Appellee respectfully submits this Honorable Court should in all things affirm the judgment of the United States District Court below.

Respectfully submitted,

C. ANTHONY FRILOUX, JR.

GERALD A. WOOLF

Attorneys for Appellee
Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
713/227-4141

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellee Gene Zaboroski do hereby certify that on this _____ day of August, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' Attorneys and other Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Brief of Appellee Gene Zaboroski":

JOE RESWEBER
County Attorney
202 Harris County Courthouse
Houston, Texas 77002

EDWARD J. LANDRY
Senior Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002

MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002

VIRGIL H. BARFIELD
Attorney in Charge for Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel for Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
Attorneys for Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
713/227-4141

By_____
C. ANTHONY FRILOUX, JR.

By_____
GERALD A. WOOLF

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A—Judgment Order of the District Court

Exhibit B—Opinion of the District Court

Exhibit C—Population Exhibit of Precinct

EXHIBIT A

FOR THE SOUTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRICT COURT

Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos. 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S.C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1974.

/s/ _____
Thomas Gibbs Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

1. Tex. Const. Art. 5, §18.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices.

These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statewide effect, and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden*.

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g.*, *State ex rel Jennett v. Owens*, 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden*.

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

---

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

---

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, as as follows:

Pct. No.	Percentage Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,105	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HARRIS COUNTY COMMISSIONERS COURT ET AL. *v.* MOORE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 73–1475. Argued November 11, 1974—
Decided February 18, 1975

Appellee justices of the peace and constable, threatened with removal before their elected terms expired, brought this action in federal court, challenging on due process and equal protection grounds the constitutionality of a Texas statute providing, *inter alia*, that when the boundaries of certain precincts are changed and more than the allotted number of justices of the peace or constables reside within the changed district the offices shall become vacant and shall be filled as are other vacancies. Under Texas constitutional provisions (a) a justice of the peace or constable "shall hold his office for four years and until his successor shall be elected and qualified," and (b) such officers may be removed by state district court judges for various causes after notice and jury trial. A three-judge Federal District Court held that the statute violated equal protection by removing some county officers but not others, and ordered appellee officials' reinstatement. *Held:* In view of the unsettled state of Texas law as to whether the state constitutional provisions ensure justices of the peace and constables tenure until their elected terms expire even when the challenged statute would require their ouster, the District Court should have abstained from deciding the federal constitutional issue, it being far from certain under various Texas precedents that appellee officeholders must lose their jobs or that the reinstatement relief ordered by the District Court is available. Pp. 5–11.

— F. Supp. —, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1475

Harris County Commissioners Court et al., Appellants, *v.* Richard E. Moore et al.	On Appeal from the United States District Court for the Southern District of Texas.

[February 18, 1975]

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. CHIEF JUSTICE BURGER.

The appellees brought this action to challenge a plan redistricting the justice of the peace precincts in Harris County, Texas. Because the plan provided for consolidation of several precincts, three former justices of the peace and two former constables lost their jobs. These five officials, along with two voters from the defunct precincts, sought to enjoin implementation of the redistricting plan on the ground that the Texas statute providing for their removal from office at the time of redistricting denied them the equal protection of the laws. The three-judge District Court granted relief, declaring the statute unconstitutional and enjoining the redistricting. The order of the District Court was stayed by MR. JUSTICE POWELL. We denied a motion to vacate the stay, 415 U. S. 905, and subsequently noted probable jurisdiction, 417 U. S. 928. We reverse and remand to the District Court with instructions to dismiss the complaint without prejudice.

I

Under Texas law, the Commissioners Court is the general governing body of each county; one of its duties is to divide the county into precincts for the election of

justices of the peace and constables, and to redistrict the precincts when necessary. Tex. Civ. Stat. Art. 2351 (1).

In June 1973, the Commissioners Court of Harris County adopted a redistricting plan for the eight justice of the peace precincts in the county. The last redistricting had taken place in 1876, and the enormous population changes in the Houston area had resulted in gross disparities in population among the precincts: the largest precinct contained approximately one million persons, while the smallest had fewer than 7,000.

Under the old plan, one justice of the peace and one constable were assigned to each precinct except the largest, which was allotted two justices and one constable. Because of the apparent discrepancy in the workload of the officials in different precincts, the Commissioners Court adopted a redistricting plan that redrew the precinct lines. Although the proposed new precincts still varied substantially in population size, the disparity was much less than it had been.

Among other changes, the plan consolidated three of the smallest precincts and parts of two others into a single new precinct. As a result, four justices and three constables found themselves residents of a single precinct, which was entitled by law to a maximum of only one constable and two justices of the peace. Pursuant to a Texas statute, Tex. Civ. Stat. Art. 2351½ (c), the Commissioners Court declared the constable and justice posts for that precinct to be vacant, since there were more officials living in the precinct than positions available.[1]

---

[1] Article 2351½ (c) provides:

"When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected

The Commissioners Court then filled the vacancies, Tex. Civ. Stat. Art. 2355, appointing one of the displaced constables to the new constable post and one of the displaced justices to one of the two new justice positions. A non-incumbent was appointed to fill the other slot.

The five officeholders, threatened with removal prior to the expiration of their elected terms, resorted to court action in an effort to block implementation of the redistricting plan. One of the constables filed suit in state court, but when that court denied his application for a temporary injunction, he apparently abandoned the action. Shortly thereafter, the three displaced justices and two constables, along with two voters who had lived in their precincts, brought suit in the United States District Court for the Southern District of Texas, claiming that the redistricting scheme was unconstitutional. Their removal pursuant to Art. 2351½ (c) violated the Due Process and Equal Production Clauses of the Four-

---

or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Another statute, Tex. Elec. Code Art. 1.05, has been read to require that school district officials reside throughout their terms in the districts that they serve. *Whitmarsh* v. *Buckley*, 324 S. W. 2d 298 (Tex. Ct. Civ. App. 1959). County commissioners, by contrast, are not required to reside in their precincts for their full terms. *Childress County* v. *Sachse*, 310 S. W. 2d 414 (Tex. Ct. Civ. App.), holding approved, 158 Tex. 371, 312 S. W. 2d 380 (1958). The Texas courts have not yet settled whether Art. 1.05 requires that justices of the peace and constables reside in their precincts throughout their terms, or whether the state constitutional provisions establishing a requirement of county residence for all county officers, Tex. Const. Art. 16, § 14; Tex. Const. Art. 5, § 24, excuse justices and constables from the requirements of Art. 1.05.

teenth Amendment, the officials contended. More specifically, they argued that the redistricting order was constitutionally invalid because it did not meet "one man—one vote" standards, because it denied voters in certain precincts the full effect of their votes, and because the precincts were redrawn along racial lines. Although the appellees did not expressly raise a state law claim in their complaint,[2] they argued in their pretrial brief that Art. 2351½ (c) was invalid under the state constitution as well, relying on several state court cases and two opinions of the Texas Attorney General. In response, the appellants requested that the complaint be dismissed because the suit raised no substantial federal questions and because the appellees had failed to exhaust their state remedies before bringing suit in federal court.[3]

A three-judge court was convened. It heard argument and issued an order later the same day. In its order, the court asserted jurisdiction and enjoined implementation of the redistricting plan on the ground that the Texas statute providing for the removal of the plaintiff justices and constables was unconstitutional on its face. A week later the court filed a brief opinion in which it wrote that insofar as the statute shortens the term of an elected public official merely because redistricting places him in a district with others, "it invidiously and irrationally discriminates between him and others not so affected." In addition, the court held that the statute as applied had discriminated between those

[2] The appellees noted in their First Amended Complaint that the state statute, as interpreted by the Commissioners Court, was in apparent conflict with Art. 5, § 24, of the Texas Constitution, which provides a mechanism for removal of county officers, including justices and constables.

[3] In their pretrial brief, the appellants more properly characterized their "exhaustion" defense as a request for the District Court to abstain.

who voted for or were entitled to vote for the displaced officials, and the voters in other precincts where the elected officials were permitted to serve a full term. Because it found no compelling interest served by redistricting in the middle of plaintiffs' terms,[4] the court held that to the extent that the redistricting order appointed other persons to plaintiffs' offices and prevented plaintiffs from carrying out their duties and receiving their salaries for the remainder of their elected terms, the order was invalid.[5]

II

The appellants urge us to reverse the District Court on the merits or, in the alternative, to order the court to abstain pending determination of the state law questions that pervade this case.[6] Because we agree with appel-

[4] The appellants point out that since staggered terms are constitutionally mandated in Texas, Tex. Const. Art. 16, § 65, it would have been impossible for the Commissioners Court to have redistricted at a time that would not have fallen in the middle of some of the justices' or constables' terms.

[5] Because it granted relief on the equal protection claim, the court found it unnecessary to reach the appellees' other contentions. Nor did the court address the state law questions or the appellants' abstention argument.

[6] We have jurisdiction of this appeal under 28 U. S. C. § 1253. The statute challenged here was plainly of statewide application; it was attacked as being unconstitutional on its face or as applied; and for the purposes of the Three-Judge Court Act, 28 U. S. C. § 2281, the defendant county commissioners were "state officers" in administering the challenged statute. *Board of Regents* v. *New Left Education Project*, 404 U. S. 541, 544 n. 2 (1972). The appellees' claim, moreover, appears sufficient to raise a question for a three-judge court. We recently stated that "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281." *Goosby* v. *Osser*, 409 U. S. 512, 518 (1973).

lants that the District Court should have abstained, we reverse without reaching the merits of the equal protection claim sustained by the District Court.

In *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), the Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question. Since that decision, we have invoked the "*Pullman* doctrine" on numerous occasions. *E. g., Lake Carriers Assn.* v. *MacMullan*, 406 U. S. 498 (1972); *Askew* v. *Hargrave*, 401 U. S. 476 (1971); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970); *Harrison* v. *NAACP*, 360 U. S. 167 (1959); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944); see Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1084–1101 (1974). We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in "special circumstances," see *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), and only upon careful consideration of the facts of each case. *Baggett* v. *Bullitt*, 377 U. S. 360, 375–379 (1964); *Railroad Comm'n* v. *Pullman Co.*, *supra*, 312 U. S., at 500.

Where there is an action pending in state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention. See *Askew* v. *Hargrave*, *supra*; *Albertson* v. *Millard*, 345 U. S. 242 (1953); *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 173 (1942); cf. *Meredith* v. *Winter Haven*,

320 U. S. 228, 236 (1943).[7] Similarly, when the state law questions have concerned matters peculiarly within the province of the local courts, see *Reetz* v. *Bozanich, supra; Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970); cf. *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959), we have inclined toward abstention. On the other hand, where the litigation has already been long delayed, see *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 329 (1964), or where it has seemed unlikely that resolution of the state law question would significantly affect the federal claim, see *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77, 84 (1958); *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 462–463 (1943), the Court has held that abstention should not be required.

Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong. See *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); *Lake Carriers Assn.* v. *MacMullan, supra; Harman* v. *Forssenius*, 380 U. S. 528 (1965); *Harrison* v. *NAACP, supra.* The same considerations

[7] In *Gibson* v. *Berryhill*, 411 U. S. 564, 580–581 (1973), we held that abstention was not required, even though a suit that might have obviated the need for federal injunctive relief was pending in the state courts. In *Gibson*, however, state authorities were pressing charges against the plaintiffs without awaiting the results of the state court action, and some of the charges against the plaintiffs might have survived even a favorable ruling in the state supreme court. Under those circumstances, we held that it was not an abuse of discretion for the District Court to decline to abstain.

apply where, as in this case, the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute.[8] Here resolution of the question whether the Texas Constitution permits the County Commissioners Court to replace constables and justices of the peace when several live in the same precinct will define the scope of Art. 2351½ (c) and, as a consequence, the nature and continued vitality of the federal constitutional claim. As we wrote in *Reetz* v. *Bozanich, supra,* 397 U. S., at 87, "the nub of the whole controversy may be the state constitution."

The appellees insist that abstention would be improper in this case because a Texas court construction of Art. 2351½ (c), would not modify or avoid the equal protection question passed on by the District Court. Having analyzed the relevant Texas statutes, constitutional provisions, and precedents, however, we are unable to share their conviction.

The Texas Constitution provides that a justice of the peace or constable "shall hold his office for four years and until his successor shall be elected and qualified." Art. 5, § 18. Justices of the peace and constables may be removed by state district court judges for various causes, after notice and a trial by jury. Art. 5, § 24. What is unsettled is whether these two provisions ensure

---

[8] In *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), we declined to order abstention where the federal due process claim was not complicated by an unresolved state law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution. But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the District Courts to abstain. See *Reetz* v. *Bozanich,* 397 U. S. 82 (1970); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639 (1959).

justices and constables tenure until the completion of their elected terms even when midterm redistricting places them outside their original precinct or puts them into a precinct that has more than its full complement of officeholders.

In two early cases, the Texas courts held that the state constitution provides no guarantee of tenure for justices and constables when the county commissioners court elects to exercise its redistricting authority. *State ex rel. Dowlen* v. *Rigsby*, 17 Tex. Civ. App. 171, 43 S. W. 271, holding approved, 91 Tex. 351, 43 S. W. 1101 (1897); *Ward* v. *Bond*, 10 S. W. 2d 590 (Tex. Ct. Civ. App. 1928). The State Supreme Court later appeared to reverse this stand in approving a lower court decision that the state constitution guaranteed to county commissioners the right to serve until the expiration of their terms, even if redistricting resulted in their living outside their precincts. *Childress County* v. *Sachse*, 310 S. W. 2d 414 (Tex. Ct. Civ. App.), holding approved, 158 Tex. 371, 312 S. W. 2d 380 (1958). In an opinion filed shortly before the District Court hearing in this case, the Texas Attorney General applied the reasoning of the *Sachse* case and ruled that to the extent that Art. 2351½ (c) vacated the office of a justice of the peace who no longer lived within his precinct, the statute was invalid.[9] The

[9] The appellees' allegation that Art. 2351½ (c) is unconstitutionally vague is revealing. The "vagueness" of which they complain is no more than uncertainty about the applicability of the statute to a particular situation; it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them. In the case where applicability of the statute is uncertain, abstention is often proper, while in the case where the vagueness claim goes to the obligations imposed by the statute, it is not, since a single state construction often would not bring the challenged statute "within the bounds of permissible constitutional certainty." *Baggett* v. *Bullitt*, 377 U. S. 360, 377–378 (1964); *Procunier* v. *Martinez*, 416 U. S. 396, 401 n. 5 (1974).

Attorney General concluded that the state constitution entitles justices and constables to serve their full terms unless they are removed pursuant to Art. 5, § 18. Op. Atty. Gen. H–220 (1974). The reasoning of the Attorney General's opinion would appear to extend to this case.[10] Although appellants contend that the Attorney General has misconstrued the Texas precedents, it seems far from settled that under state law the appellee officeholders must lost their jobs.[11]

These difficult state law questions intrude in yet another way that strengthens the case for abstention. The proper scope of the order entered by the District Court and the applicability of that order to the plaintiffs' claims depend directly on questions of state law. The court's initial order held Art. 2351½ (c) unconstitutional and enjoined the redistricting plan altogether. In its opinion, the court apparently intended to narrow its order somewhat, by holding the statute unconstitutional as applied and by enjoining the redistricting order only to the extent that it removed the appellees from their jobs. Yet even that relief was broader than the court's holding would support. Absent Art. 2351½ (c), Texas law

---

[10] Opinions of the Attorney General are "entitled to careful consideration by the courts, and quite generally regarded as highly persuasive," *Jones* v. *Williams*, 121 Tex. 94, 98, 45 S. W. 2d 130, 131 (1931). The 1974 opinion, however, may be given close scrutiny by the state courts, as it appears to be in direct conflict with several earlier opinions of the Attorney General, see n. 12, *infra*.

[11] Even if the *Sachse* case does not apply to justice precincts, Art. 2351½ (c) may still be invalid under state law as a legislative encroachment on the county commissioners' constitutional powers to fill justice vacancies created in the course of redistricting. Tex. Const. Art. 5, § 28. See Op. Atty. Gen. M–68 (1967). If the statute is unconstitutional for this reason, all the justice positions in the county would have been vacated, not just those occupied by the appellees. Obviously, this construction of Texas law would drastically alter the nature of appellees' federal claim.

may well dictate that upon redistricting, all the justice and constable positions in the county would be vacated.[12] Since the District Court concluded only that Art. 2351½ (c) denied the officeholders and voters equal protection by removing some officials in the county but not others, it should not automatically have imposed one remedy—reinstatement—when Texas law might well call for quite another—removal of all the affected officeholders. Yet if the District Court had limited itself to declaring Art. 2351½ (c) unconstitutional, and the Commissioners Court had determined that state law would then require that all the county justice and constable positions be vacated,[13] the appellees would be forced to resort to state court in order to vindicate their claimed right to reinstatement. In short, not only the character of the federal right asserted in this case, but even the availability of the relief sought turn in large part on the same unsettled state law questions. Because the federal claim in this case is "entangled in a skein of state law that must be untangled before the federal case can proceed," *McNeese* v. *Board of Education*, 373 U. S. 668, 674 (1963), we conclude that the District Court erred in not adopting appellants' suggestion to abstain.

In order to remove any possible obstacles to state court jurisdiction, we direct the District Court to dismiss the complaint.[14] The dismissal should be without prejudice

---

[12] There is support for this view in several early cases and in a number of state Attorney General's opinions. See *Brown* v. *Meeks*, 96 S. W. 2d 839 (Tex. Ct. Civ. App. 1936); *State ex rel. Dowlen* v. *Rigsby*, *supra*; Op. Atty. Gen. V–790 (1949); V–1032 (1950); WW–536 (1958); C–112 (1963). These opinions were qualified in a manner not affecting this case in Op. Atty. Gen. M–68 (1967); see also Op. Atty. Gen. M–562 (1970).

[13] The Commissioners Court has in fact adopted this view of Texas law in this case. Brief for Appellants 18–20.

[14] Ordinarily the proper course in ordering *"Pullman* abstention" is to remand with instructions to retain jurisdiction but to stay the

so that any remaining federal claim may be raised in a federal forum after the Texas courts have been given the opportunity to address the state law questions in this case. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 421–422 (1964).

Reversed and remanded.

---

federal suit pending determination of the state law questions in state court. See *Zwickler* v. *Koota*, 389 U. S. 241, 244 n. 4 (1967). The Texas Supreme Court has ruled, however, that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim. *United Services Life Ins. Co.* v. *Delaney*, 396 S. W. 2d 855 (Tex. 1965); see *Romero* v. *Coldwell*, 455 F. 2d 1163, 1167 (CA5 1972); *Barrett* v. *Atlantic Richfield Co.*, 444 F. 2d 38, 45–46 (1971).

We have adopted the unusual course of dismissing in this case solely in order to avoid the possibility that some state law remedies might otherwise be foreclosed to appellees on their return to state court. Obviously, the dismissal must not be used as a means to defeat the appellees' federal claims if and when they return to federal court.

SUPREME COURT OF THE UNITED STATES

No. 73–1475

Harris County Commissioners Court et al., Appellants, *v.* Richard E. Moore et al.	On Appeal from the United States District Court for the Southern District of Texas.

[February 18, 1975]

MR. JUSTICE DOUGLAS, dissenting.

The principle of abstention—judicially created by *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941)—promises to become a serious barrier to the assertion by federal courts of the jurisdiction Congress has bestowed on them. In the present case, suit was started in 1973 in the District Court, which rendered its judgment January 30, 1974. The term of office of the three justices of the peace who were ousted expired December 31, 1974; that of the two constables will expire December 31, 1976. After being brought all the way here by the State that has ousted them from office, they are now told that their federal suit is dismissed and that they must start litigation anew in the state courts. They would necessarily have to be very rich office-holders—or else be financed by some foundation—to be able to pay the expense of this long, drawn-out litigation.

The three judges who made up the District Court in this case were Thomas G. Gee, John V. Singleton, Jr., and Carl O. Bue, Jr., all named from Texas, all versed in the idiosyncrasies of Texas law. A state agency, acting with full authority of state law,* has ousted these elected offi-

*Tex. Civ. Stat. Art. 2351½ (c) provides:

"When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or ap-

cials. By remitting them to a state court we nov leave them without an effective remedy in view of the short terms of office that are involved. I said in *Harrison* v. *NAACP*, 360 U. S. 167, 184 (1959) (dissenting opinion):

> "We need not—we should not—give deference to a state policy that seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by Congress on the federal judiciary in the Civil Rights Acts when we do so."

We have a like situation here.

Here, as in cases in a federal court by reason of diversity of citizenship, ordinarily a federal court must not decline to exercise the jurisdiction Congress has conferred upon it "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state," *Meredith* v. *Winter Haven* 320 U. S. 228, 234–235 (1943). The alternate course, we held, "would thwart the purpose of the jurisdictional act," *id.*, at 235.

The teaching of *Pullman* is greatly exaggerated here. No special circumstances warranting abdication of federal jurisdiction have been shown. Where the judges making up the panel of the three-judge court are from the State whose local law is at issue, I would leave it to them to decide whether the policy of *Pullman* should be applied in a given case. They know about *Pullman* as

---

pointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant."

well as most of us. It was a new doctrine when announced. It is word that has long been part of the warp and woof of federal law.

The three judges, seasoned in Texas law, saw no ambiguities, no exotic question of law remaining unresolved, and rendered a forthright decision that was eminently correct on federal law. I would leave to our district judges the question whether the local law problem counseled abstention.

We do a great disservice when we send these tired and exhausted litigants into the desert in search of this Holy Grail that is already in the keeping of the federal court.